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No. 304

Supreme Court of the United States

OCTOBER TERM, 1966

AMERICAN AIRLINES, INC., TRANS WORLD AIRLINES, INC., UNITED AIR LINES, INC., *Petitioners,*

v.

CIVIL AERONAUTICS BOARD, ET AL., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

HOWARD C. WESTWOOD
WILLIAM H. ALLEN
EDWARD J. GRENIER, JR.
701 Union Trust Building
Washington, D.C. 20005

CARL S. ROWE
25 Broadway
New York, N. Y. 10004

WARREN E. BAKER
640 Shoreham Building
Washington, D.C. 20005

H. TEMPLETON BROWN
ROBERT L. STERN
FLOYD M. RETT
231 South LaSalle Street
Chicago, Illinois 60604

Attorneys for Petitioners

Of Counsel:

COVINGTON & BURLING

CHADBOURNE, PARKE, WHITESIDE & WOLFF

MAYER, FRIEDLICH, SPIESS, TIERNEY, BROWN & PLATT

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v.

CIVIL AERONAUTICS BOARD, ET AL., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners, American Airlines, Inc., Trans World Airlines, Inc., and United Air Lines, Inc., pray that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the District of Columbia Circuit entered on March 2, 1966.

OPINIONS BELOW

The opinions of the panel of the Court of Appeals that initially heard the case and of the court *en banc* on rehearing (App. A, pp. 1a-39a, *infra*) are not yet reported.

The order of the Civil Aeronautics Board that was reviewed in the Court of Appeals (App. C, pp. 42a-44a, *infra*) is not reported.

JURISDICTION

The judgment of the Court of Appeals (App. B, pp. 40a-41a, *infra*) was entered on March 2, 1966. By order entered May 14, 1966, the Chief Justice extended the time for filing a petition for certiorari to and including June 30, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether an administrative agency may deprive common carriers holding certificates of public convenience and necessity of a portion of the authority they had under their certificates through the adoption by the agency of a policy statement without an evidentiary hearing, when the relevant statute provides that a certificate can be amended or modified only upon specific findings by the agency after notice and evidentiary hearing.

2. Whether an administrative agency may summarily outlaw, without hearing, tariff filings of common carriers identical to those of a competitor which the agency accepts and allows to go into effect, when the relevant statute provides that rates can be invalidated only upon specific findings by the agency after notice and evidentiary hearing.

3. Whether an administrative agency can eliminate competition among common carriers by a rule adopted without notice to or the opportunity for written submissions of data and views by the competing carriers or the public.

STATUTES INVOLVED

The provisions of the Federal Aviation Act and the Administrative Procedure Act principally involved are set forth in Appendix D hereto, pages 45a-60a, *infra*.

STATEMENT

This case poses questions of vital importance in the regulation of transportation: questions of the integrity of carriers' licenses, of carriers' rights to compete and of shippers' rights to rates reduced by competition. The decision below allows those rights to be denied by an administrative decree promulgated without notice or evidence and enforced without the possibility of effective judicial review.

Petitioners are common carriers by air holding certificates of public convenience and necessity under the Federal Aviation Act authorizing them to engage in air transportation of persons, property and mail between, among other places, points on the two coasts and cities in between. The Slick Corporation and the Flying Tiger Line also are holders of such certificates of public convenience and necessity; their certificates authorize them to engage in the air transportation of property and mail only, over transcontinental routes in competition with petitioners.

The Federal Aviation Act,[1] as did its predecessor the Civil Aeronautics Act of 1938,[2] places common carriage by air under the comprehensive regulation of the Civil Aeronautics Board. A carrier cannot engage in air transportation except pursuant to a certificate of public convenience and necessity, § 401(a), issuable after notice and hearing and on an evidentiary record, §§ 401(c), (d); and such a certificate can be amended or modified only after notice and hearing and on an evidentiary record, §§ 401(f) and (g). Rates must be specified in a tariff, § 403(a), and must be reasonable and nondiscriminatory, § 404. The Board can suspend the effectiveness of tariff changes for periods not exceeding 180 days, § 1002(g), and after notice and hearing and on an evidentiary record, upon finding that a rate is

[1] 72 Stat. 731 (1958), *as amended*, 49 U.S.C. § 1301 *et seq.* (1964).

[2] 52 Stat. 973.

unlawful, can require compliance with the Act, § 1002(c), or itself fix the lawful rate, § 1002(d).

Petitioners' operations began before 1938 when federal economic regulation of air transportation was instituted. Their original certificates of public convenience and necessity—since amended and added to from time to time—were issued under the so-called grandfather provisions of the Civil Aeronautics Act of 1938. The certificates have always included, without restriction, authority to carry property, and petitioners have exercised this authority from the beginning. Since 1944 they have carried air freight in all-cargo freighters as well as in the cargo compartments of their passenger-carrying aircraft.

In 1949, the Board issued temporary certificates of public convenience and necessity to certain other carriers, including Slick and Flying Tiger, authorizing them to carry property only. *Air Freight Case,* 10 C.A.B. 572 (1949). These two carriers have since been authorized to carry mail as well as freight, and their certificates have been made permanent. *Domestic Cargo-Mail Service Case,* 36 C.A.B. 344 (1962); *Airfreight Certificate Renewal Case,* 23 C.A.B. 186 (1956). They have been authorized also to engage in charter operations, including passenger charters; both have done so, Flying Tiger extensively.

These carriers are commonly referred to as all-cargo carriers. There is one other such carrier authorized to engage in domestic air transportation — Airlift International. Its domestic operations are mainly on north-south routes in the east, competitive only to a limited degree with any of the petitioners, Slick or Flying Tiger.

Petitioners and other air carriers authorized to carry both persons and property, often referred to as combination carriers, have developed a very substantial air freight business. The terms of their certificates with reference to property are identical to those of the certificates of the all-

cargo carriers. There has never been any doubt that their certificates authorize them to transport property in freighters. Of the total freight transported in freighter aircraft in domestic air transportation, 64 per cent was transported by the combination carriers in their freighters and 36 per cent by the all-cargo carriers in their freighters in 1963, a recent representative year.

At the time of the actions of the Civil Aeronautics Board that are in question here, the combination carriers had an investment on the order of $400,000,000 in domestic all-cargo service (R. 146, J.A. 82),[3] including $200,000,000 in late-model jet freighters. Their freight facilities include especially designed mechanical loading equipment and other costly ground equipment for the freight business. They are now in the midst of expansion programs involving additional investments of hundreds of millions of dollars in freighters and ground equipment.

Development of the air freight business has taken place under a regime of vigorous competition, in particular among these petitioners, Flying Tiger and Slick on the transcontinental routes, which are the principal cargo routes. Competition has been especially keen for the business of large-scale, regular shippers and of air freight forwarders, who combine small lots into large shipments. A weight-break system has long been incorporated in freight tariffs to appeal to these classes of shippers; under this system, the charge per pound is graduated downward as weight of shipment increases. Also, the carriers have set up systems for reserving space in advance of flights,

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[3] Citations to the record certified by the court of appeals are designated "R." Parallel citations to the joint appendix filed in the court below, designated "J.A.," are included because petitioners are furnishing nine (9) additional copies of the Joint Appendix for the convenience of the Court. References to the unprinted record in the Board's proceeding are designated "Unprinted Tr." The unprinted record has been filed in this Court.

which principally benefit large-scale, regular shippers and forwarders.

In the fall of 1963, the economies and efficiency of jet passenger aircraft were beginning to be manifest. The introduction by the combination carriers of jet freighters with promise of the same economies and efficiency was imminent. The all-cargo lines had not ordered jet freighters.

At this point the all-cargo lines proposed the abandonment of the competitive regime for air freight business. They presented to the Board, *ex parte,* what came to be called the White Paper. (Unprinted Tr. 1066.) This was a document that called for "a delineation of the roles" of the combination carriers and the all-cargo carriers. Under the suggested delineation of roles only the all-cargo carriers would have been permitted to carry freight in freighter aircraft; the combination carriers would have been limited to the carriage of whatever freight could be handled in their passenger aircraft.

On January 23, 1964, shortly after the *ex parte* presentation of the White Paper, but without reference to it, the Board published a notice of proposed rulemaking, dealing principally with amendments to the Board's regulations governing passenger and cargo charter trips. (R. 179-92, J.A. 115-28.) Included in the notice was a wholly unrelated proposal to add a hortatory section to a part of the Board's regulations that is styled Statements of General Policy. This addition was entitled, "Pooling arrangements of certificated air carriers"; it would have stated merely that "it is the policy of the Board to permit the all-cargo carriers to sell blocked space at wholesale rates to such combination carriers as may choose to do so to provide service between the certificated points of the combination carrier involved." (R. 192, J.A. 128.)

Blocked space means an arrangement, under which a person buys space from a carrier for the carriage of

freight over a period and pays for it, at a discount, whether he uses it or not. The Board's stated purpose was to encourage the combination carriers to make use of the all-cargo carriers in the combination carriers' freight business, the combination carriers selling to shippers at their regular rates and then having the freight transported on the all-cargo carriers' freighters in blocked space purchased by the combination carriers at a lower "wholesale" rate. (R. 186, J.A. 122.) The combination carriers also would continue to transport freight in their own freighters.

Written comments on the proposed amendments to the charter regulations and on the proposed new statement of policy were invited. These petitioners, noting that the formal rulemaking notice spoke of a purpose "to delineate the roles of the all-cargo . . . carriers" (R. 179, J.A. 115), included in their comments arguments that, if the Board intended the proposed policy statement as a step toward eliminating the combination carriers from the bulk cargo business, as proposed in the White Paper, the ultimate goal of elimination could not be achieved legally under the procedure the Board was following. (R. 194-95, 196-97, J.A. 130-31, 132-33.) Moreover, they challenged as untrue, unproved, or at best misleading in view of the introduction of jet freighters, the one factual allegation the Board made in support of its proposed statement — that "all-cargo services of the combination carriers have been operated at substantial losses." (R. 186, J.A. 122; Unprinted Tr. 819-21, 965-67, 1120-21, 1632-33, 1672-74, 1792-93.)

After having received these and other comments, the Board gave notice that it would hear oral argument in the rulemaking proceeding. (R. 201-04, J.A. 137-40.) The Board listed seven questions to which it wished the argument to be addressed. Six of these related to the proposed amendments to the charter regulations, not pertinent to this case. The seventh restated in interrogatory form the statement of policy the Board had proposed in its notice:

whether it should be the Board's policy to permit all-cargo carriers to sell blocked space at wholesale rates to combination carriers. But it added a wholly new question: whether the all-cargo carriers should "be permitted to sell blocked space at wholesale rates to air freight forwarders and other large volume shippers." (R. 204, J.A. 140.)

The blocked space question thus became something quite different from the question that had been posed in the notice of proposed rulemaking. How different was not made clear. The proposed policy statement itself was not republished in any amended form, and there was no indication how far the Board meant to go in depriving the combination carriers of their historic certificate authority to carry freight on equal terms with the all-cargo lines—if indeed it intended this at all.

There was no opportunity to explore this significant new proposal in writing, as its nature required; even if the Board's notice did not imply the possibility of an exclusive privilege for the all-cargo carriers, the offering of reduced rates based on aggregating shipments pursuant to a contract, while not novel, raised issues of fact and law not raised by intercarrier pooling arrangements, which had been the subject of the original rulemaking notice. See *Deferred Airfreight Case*, 23 C.A.B. 651, 665-71 (1956). The Board depended wholly upon a two-hour oral argument for enlightenment on the new question it posed; all of the combination carriers together were assigned but 45 minutes to make their presentation. (Unprinted Tr. 1882.) The argument was heard on July 9, 1964.

A month earlier, Slick had filed for effectiveness July 20 what it styled a blocked space tariff, establishing substantial discounts for shippers who purchased blocked space. (R. 122-23, J.A. 58-59.) The petitioners and Flying Tiger filed complaints, alleging that the Slick tariff was unlawful under the ratemaking provisions of the Federal Aviation Act and asking that it be suspended and

subjected to an evidentiary hearing. (R. 125-26, J.A. 61-62.)

The petitioners also filed defensive blocked space tariffs of their own. (R. 122-23, 129, 156, J.A. 58-59, 65, 92; Unprinted Tr. 158-77, 205-25, 238-58.) Flying Tiger did not make a defensive filing. It said that the Slick rates were so unreasonably low that it would rather suspend operations and conserve its resources than match them. (R. 82, J.A. 17.) On July 17 the Board entered an order placing the Slick tariff and that of petitioner TWA, which had been the first of the petitioners to match Slick, under investigation and suspending the effectiveness of both of them. (R. 122-28, J.A. 58-64.) On July 27 it acted similarly with respect to the defensive blocked space tariff of petitioner American. (R. 129-31, J.A. 65-67.)

On August 7 the Board, in its rulemaking proceeding, adopted and made immediately effective what it termed a Statement of General Policy. (R. 138-44, J.A. 74-80.) In a preamble, the Board recited that it had "concluded to adopt a policy approving the *exclusive* right of all-cargo carriers to sell blocked space to combination carriers, air freight forwarders, and large volume shippers." (Emphasis supplied.) (R. 139, J.A. 75.) Then the statement, now headed "Blocked Space Service," proceeded with provisions that looked not at all like the statement of policy that had been proposed and on which comments had been received. The statement as adopted defined blocked space service; stated that it was the Board's policy to permit the all-cargo carriers to provide blocked space service not only to combination carriers but also to forwarders and large volume shippers; and added that "it is the policy of the Board not to permit combination carriers to provide blocked space service." 14 C.F.R. § 399.37. (R. 144, J.A. 80; App. D, p. 61a, *infra*.) Two of the five members of the Board dissented. (R. 145-52, J.A. 81-88.)

In promulgating this Statement of General Policy, the Board for the first time cited Section 416(a) of the Federal

Aviation Act, which empowers it to "establish such just and reasonable classifications or groups of air carriers for the purposes of this title as the nature of the services performed by such air carriers shall require . . . ." (R. 139, J.A. 75.) Section 416(a) had not been invoked in the notice of rulemaking. (The Board there had mentioned only Section 401, under which the Board has authority to regulate charter flights, the principal subject of the original notice (R. 179, J.A. 115); action on the proposed charter regulation amendments was deferred when the policy statement was promulgated (R. 139, J.A. 75).)

The Board's policy statement did not relate to a new kind of service or a new concept, although it purported to define "blocked space service." Indeed, Slick had argued in defense of its blocked space tariff before the policy statement was issued that "the blocked space concept actually has a long history" and that there was "nothing unique" about it. (R. 70-71, J.A. 5-6.) The combination carriers—and the all-cargo carriers—for years had permitted shippers to reserve space daily or several times a week, or on whatever basis their needs dictated, and the weight-break system afforded a discount for volume shipments. The Board's policy statement decreed that the all-cargo carriers could offer an additional discount in consideration of the shipper's agreement to pay for space for recurring shipments over a period of time.

On the same day that the policy statement was issued, the Board vacated the suspension of Slick's tariff but not those of TWA and American (R. 131-33, J.A. 67-69), and later, on August 10, it suspended and ordered an investigation of petitioner United's blocked space tariff, which was the last filed (R. 156-58, J.A. 92-94). This meant that the Board was going to have a hearing concerning the legality of all the tariffs, but while the hearing was in progress only the Slick tariff would be in effect.

But then on August 11 the Board decided that the new policy statement empowered it to reject the tariffs of the

petitioners rather than merely to suspend their effectiveness. (R. 158-60, J.A. 94-96; App. C, pp. 42a-44a, *infra*.) In an order of that date, the three-man majority of the Board, over the dissents of two members who sharply questioned the legality of the action being taken, said:

> "American, TWA and United are combination carriers as contemplated in this regulation and without authority to provide blocked space service. It follows, in view of this determination, that the tariffs of American, TWA, and United are inconsistent with the regulations of the Board as well as with the provisions of section 403 of the Federal Aviation Act of 1958. Consequently, we will herein reject [the] block space tariffs of American, TWA, and United as unauthorized by section 403 of the Act and the provisions of the Board's regulations." (R. 159, J.A. 95; App. C, pp. 42a-43a, *infra*.)

The difference between rejection and suspension is critical. Suspension is limited by the statute to no more than 180 days and is solely for the purpose of permitting the Board to investigate a tariff or tariff provision in an evidentiary proceeding to determine its lawfulness. § 1002(g). But a tariff that is rejected is void. § 403(a). Accordingly the Board ordered the tariffs of the petitioners removed "as an issue" from the rate investigation; the rate case would proceed only as to Slick's tariff. (R. 159, J.A. 95.) Peremptorily the petitioners' tariffs were invalidated.

Thus a statement of general policy, which had been proposed as a mere indication to the carriers that the Board would look with favor on certain pooling arrangements between all-cargo and combination carriers, was suddenly given the effect of depriving the combination carriers of the authority to engage in the freight business on a blocked space basis, while at the same time the competing all-cargo carriers had that authority. No certificate amendment proceedings, no rate proceedings, had been held; nothing had been done except to adopt, in the manner we have described, a Statement of General Policy.

The petitioners petitioned for review of the order of rejection in the Court of Appeals. They argued that the Board had amended or modified their certificate authority without the notice and hearing required by Section 401(g) of the Federal Aviation Act and had acted illegally in the exercise of its power over rates by preventing petitioners from filing tariffs equivalent to the tariff of a competitor and by doing so without notice and hearing, and had not complied with Section 4 of the Administrative Procedure Act in the rule-making proceeding in which the policy statement that was the basis for its action had been adopted. A division of the Court of Appeals agreed with petitioners on their first ground of challenge and issued an opinion, with one dissent, setting aside the Board's order. (App. A, pp. 1a-12a, *infra.*) Petitions for rehearing *en banc* were filed by Slick, which had intervened in the Court of Appeals, and by the Board. The Slick petition was denied, but the Board's petition was granted, and on rehearing the court *en banc* decided, 5 to 3, to affirm the Board's action in rejecting petitioners' tariffs. (App. A, pp. 13a-39a, *infra.*) The court held that the Board could act as it had, following the procedure that it had, because its action was directed at a class of air carriers and not at individual carriers. It distinguished on that ground this Court's decision in *CAB* v. *Delta Air Lines,* 367 U.S. 316 (1961), holding that notice and evidentiary hearing must precede modification of an air carrier's certificate. The court relied upon the existence of a supposed "malaise" in the administrative process brought about by " 'too rigidly' " applying statutory requirements for notice and evidentiary hearing to licensing cases.

• • •

Subsequent to the filing of the petition for review in the lower court there have been these developments:

With the permission of the Board, Slick has suspended its common-carrier freight service, CAB Order Nos. E-22588, Aug. 27, 1965; E-23352, Mar. 14, 1966, and has

taken steps (not yet consummated) to dispose of that part of its operations to Airlift International, the third domestic all-cargo carrier, see Joint Application of Airlift International, Inc. and The Slick Corporation for an Exemption, CAB Docket No. 17341, May 18, 1966.

Despite its initial distaste for the Slick blocked space tariff, Flying Tiger later filed a blocked space tariff. Thus it has an absolute blocked space monopoly. As a monopolist, Flying Tiger has tailored the blocked space concept to its own interest.

Slick's original blocked space tariff was accompanied by an amendment to its existing air freight tariff by which Slick in effect ceased holding out to carry shipments of less than 200 pounds. Although Slick's small-package business was minuscule, Slick asserted that its relinquishment of that business distinguished its tariff from the tariffs of petitioners. (R. 91, 100, J.A. 26, 36.) Flying Tiger's tariff does not provide for any such abandonment of small-package service.[4]

Slick's original tariff required a shipper to designate the particular flights on which he was contracting for space. Recently, Flying Tiger has revised its tariff to permit a shipper, instead of specifying the flights or even the days of the week on which space is reserved, to specify only the number of reservations to be made during the course of a week. The revisions also reduced the spread between blocked space rates and ordinary rates so that for a large proportion of blocked space business the rates are just

[4] The court below noted the point that Slick had made, saying that the petitioners' tariffs were "similar to but not identical with Slick's . . .." (App. pp. 14a-15a, *infra*). The Board, however, said that TWA's original filing, "not different from those of the other petitioners, "essentially matches Slick's." (R. 123, J.A. 59; see also R. 129, 156, J.A. 65, 92). And now there is no longer even a theoretical difference in this respect between the tariff of petitioners' only transcontinental all-cargo competitor and their rejected tariffs.

3 per cent less than ordinary general commodity rates. The Board permitted these revisions to go into effect, over complaints that they departed altogether from the blocked space concept.[5]

REASONS FOR GRANTING THE WRIT

The Civil Aeronautics Board deems this case to be one in which "the question of administrative law presented is of major importance to the administration of the Federal Aviation Act and other similar regulatory statutes . . .." (R. 253.) Thus the Board spoke when it petitioned the court below for a rehearing *en banc*.

That judgment of the Board is abundantly warranted. The question presented concerns the power of an agency, by decree adopted without notice and hearing or even observance of the minimal procedural requirements for lawful rulemaking, to deprive holders of common-carrier licenses of a part of their license authority and thereby prevent them from competing for business by matching a competitor's reduced rates.

The action taken by the Board in the exercise of this assumed power is of great importance for its present and potential effect upon the air freight business,

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[5] The Board had said that "blocked space arrangements would appear to provide a means for obtaining better planning on the part of carriers as well as shippers." (R. 142, J.A. 78.) A carrier left to guess on which days its big shippers will use its services is in no better position to plan than a carrier without any effective blocked space tariff. Hence the blocked space concept is merely a facade by which the Board permits Flying Tiger to offer lower quantity rates than its competitors are entitled to meet.

The Board has followed its decision in the order under review by rejecting as blocked space tariffs not authorized to combination carriers tariffs that have been filed by combination carriers to match Flying Tiger's tariff and its various revisions. CAB Order Nos. E-21575, Dec. 10, 1964; E-21820, Feb. 19, 1965; E-23127, Jan. 18, 1966; E-23653, May 9, 1966.

which is today perhaps the nation's fastest-growing business. The hundreds of millions of dollars invested and now being invested by the petitioners and the other combination carriers in air freight service give point to forecasts that, as has happened in other modes of transportation, in the foreseeable future transportation of freight by air will surpass passenger transportation in importance. (See Dissenting Op., App. A, p. 38a, *infra*.) The Board's action has resulted in a single carrier's enjoying a monopoly of a reduced-rate service on the transcontinental routes, the most important air freight market. By the Board's decree shippers are denied the benefits of competition, and shippers in cities not served by Flying Tiger are denied altogether the benefits of the reduced rates.[6]

Doctrinally the decision below sustaining the Board's assumption of power has significance far beyond the air freight business. It affects the Board in its entire administration of the Federal Aviation Act and other federal agencies in their administration of similar regulatory statutes. The decision is in conflict with decisions of this Court affirming that a regulated firm's license authority, on the basis of which it makes its investments in licensed activities, cannot be modified without strict observance of congressionally prescribed safeguards. The decision also runs directly counter to the established principles that carrier rates are subject to cancellation by an agency only on findings made on an evidentiary record and that competing carriers may meet one another's rates. Finally, the decision is in the teeth of the provisions of the Administrative Procedure Act that specify how agencies are to go about making rules.

1. (a) In landmark decisions this Court has been insistent that administrative agencies may modify the licenses

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[6] A former member of the Board has stressed the importance in the airline industry of the "free play of competitive forces." Hector, *Problems in Economic Regulation of Civil Aviation in the United States*, 26 J. Air L. & Com. 101 (1959).

that set forth the basic authority of the persons they regulate only pursuant to procedures specifically sanctioned by Congress.

The Court's concern with the integrity of a license is fully justified. Investments aggregating in the billions of dollars have been made by regulated enterprises in reliance upon license authority. The license is the keystone of the typical federal regulatory scheme. The statutes under which licenses are required also confer on agencies drastic power to regulate the exercise of the authority, such as the power to regulate rates. And the power of an agency, by rulemaking, to enforce various substantive provisions of its statute is extensive. See *American Trucking Ass'ns* v. *United States,* 344 U.S. 298 (1953); *FPC* v. *Texaco, Inc.,* 377 U.S. 33, 42 n. 12 (1964). The sweep of this power to regulate licensees, respecting which the Federal Aviation Act is notable, no doubt contributes to this Court's insistence that agencies not transgress upon the scope of license authority without following the notice and hearing procedure specified by Congress, with its assurance of effective judicial review.

Section 401(g) of the Federal Aviation Act provides that the Board may "alter, amend, modify, or suspend" an air carrier's certificate of public convenience and necessity only after notice and hearing. Here the Board modified petitioners' certificates without following Section 401(g) procedures. It decreed that as a result of a policy statement adopted without notice and concededly without an evidentiary hearing the petitioners were "without authority" to provide what it called blocked space service; prior thereto they had had such authority. (R. 159, J.A. 95; R. 255.) The fact that the Board did not physically rewrite the license instruments held by petitioners is immaterial, as this Court has held. If, by the adoption of a rule, the scope of a licensee's authority under an existing license is altered, there is a modification of the license that can be effected validly only if the agency complies with the procedure that Con-

gress has prescribed for license modification. *FCC v. National Broadcasting Co.* (*KOA*), 319 U.S. 239 (1943).

In affirming the Board's action in modifying petitioner's certificates without following the prescribed procedure the court below has decided an important question of federal law in a way contrary not only to this Court's decision in the *KOA* case but also to its decisions in *United States* v. *Seatrain Lines,* 329 U.S. 424 (1947), and *CAB* v. *Delta Air Lines,* 367 U.S. 316 (1961).

In the *Delta* case a trunk air carrier had been granted a license by the CAB that permitted a measure of competition between it and a carrier of another class, a local-service carrier. Such a grant was subject to reconsideration upon timely petition. A timely petition to reconsider was filed before the effective date of the license. Prior to that date the Board entered an order reserving jurisdiction later to determine the pending petition to reconsider. Shortly after the effective date of the license it reconsidered, altered the license so as to reduce the authorized competition, and in doing so found that the alteration would have minimal adverse impact on the trunk carrier. The hearing record upon which the license had been granted was still fresh, and the alteration was based on that record. Nonetheless the Court held that, once effective, the license could be modified only after notice and a new hearing under Section 401(g) of the Federal Aviation Act.

The Court declared that "'the specific instructions set out in the statute should not be modified by resort to such generalities as 'administrative flexibility' and 'implied powers.'" 367 U.S. at 325. This view rested not only upon the language of the statute but also upon the legislative history of the Civil Aeronautics Act, the predecessor of the Federal Aviation Act, showing that "Congress was vitally concerned with what has been called 'security of route'—*i.e.,* providing assurance to the carrier that its investment in operations would be protected insofar as reasonably pos-

sible." *Id.* at 324. And apart from considerations peculiar to the Federal Aviation Act, the opinion noted that in *United States* v. *Seatrain Lines, supra,* the Court had spoken "in general terms of the rule that supervising agencies desiring to change existing certificates must follow the procedures 'specifically authorized' by Congress and cannot rely on their own notions of implied powers in the enabling act." *Id.* at 333-34. Pointedly the Court admonished that "arguments to the effect that 'this is just another way of doing it' will not prevail." *Id.* at 333-34 n.15.

(b) Both the Board itself and the court below treated the Board's action as a modification of license authority and not as regulation of conduct thereunder. In its critical order rejecting their tariffs the Board stated expressly that petitioners were "*without authority* to provide blocked space service." (Emphasis supplied.) (R. 159, J.A. 95.) The court in affirming the rejection did not even cite the *American Trucking* case, the leading precedent supporting agency action by rulemaking to regulate the exercise of license authority. And the course of the Board's procedure reveals that it was perforce modifying authority and not merely regulating its exercise.

The Board's purpose was to create a monopoly of blocked space service in the hands of all-cargo carriers. That purpose could not be achieved by any lawful regulation of its licensees' conduct under their licenses, *i.e.*, of the rates that they could charge for services rendered, although the Board initially attempted to use its rate regulation powers to accomplish its policy goal. When petitioners filed blocked space tariffs to match the Slick tariff, the Board placed them under investigation, instituting a rate case in which there would be an evidentiary hearing, and suspended their effectiveness, all as authorized by statute. (R. 122-28, 129-31, 156-58, J.A. 58-64, 65-67, 92-94.) Slick's tariff was also placed under investigation and was initially suspended.

(R. 122-28, J.A. 58-64.) But, when the blocked space policy statement was issued, Slick's suspension was lifted. (R. 131-33, J.A. 67-69.)

This course meant that, while Slick's tariff would go into effect immediately, the petitioners' tariffs also would go into effect in 180 days—the maximum suspension period—unless the rate case was concluded in the meanwhile and petitioners' tariffs were found to be unlawful. But if petitioners' rates were found unlawful the illegality would infect Slick's rates also, and all would have to be cancelled. Under the ordinary statutory requirement that rates be reasonable and nondiscriminatory, as among competitors a given rate could not be lawful for one and unlawful for the others, in the absence of differences among the carriers' costs of providing service of a kind that has not been suggested here. *New York Central R.R.* v. *United States*, 99 F. Supp. 394, 398 (D. Mass. 1951), *aff'd per curiam*, 342 U.S. 890 (1951). And see *Texas & Pac. Ry.* v. *United States*, 289 U.S. 627, 636 (1933); *Air Freight Forwarder's Ass'n*, 8 C.A.B. 469, 472 (1947); *Air Freight Rate Investigation*, 9 C.A.B. 340, 350 (1948). This is true to a large extent even in the case of intermodal competitors under this Court's decision in *ICC* v. *New York, N. H. & H. R.R.*, 372 U.S. 744 (1963). Obviously, therefore, the Board could not accomplish its policy purpose by exercise of its power to regulate rates.

The Board's policy was based on its assertion (with no evidentiary support) that there would not be enough business from large, regular shippers (and forwarders) to permit all the carriers to operate at the reduced blocked space rates. (R. 142, J.A. 78.) Thus it faced a problem of rationing business among competing aspirants—a problem for the solution of which Congress provides licensing procedures. *Cf. Ashbacker Radio Corp.* v. *FCC*, 326 U.S. 327 (1945).

But the problem could not be treated as one of initial licensing. The existing licenses of all the carriers already authorized them to engage in the business in question. (R. 255.) All included unrestricted cargo authority in identical terms and, as Slick said, there was nothing unique in the concept of selling cargo service on a blocked space basis. (R. 71, J.A. 6.) All the carriers had always reserved space for shippers. In the passenger business a charge for an unused reservation was a familiar device. And certainly nothing in their licenses prevented either the all-cargo carriers or the combination carriers from reducing rates.

The Board therefore determined to treat the case as involving a type of "service"—blocked space—that the all-cargo carriers' licenses authorized, but that the verbally identical licenses of the combination carriers did not authorize because of the modification effected by the policy statement. Thus it enabled itself summarily to reject the petitioners' tariffs, creating an all-cargo carrier monopoly of the "service" it had defined.

(c) The reasoning of the court below in sustaining the Board's action raises grave questions as to the integrity of licenses of regulated firms and the ability of agencies by fiat to create monopolies of important segments of the enterprises they regulate. The court held that an agency may modify licenses without observance of the procedural safeguards that Congress has prescribed as long as it is dealing with all its licensees or fairly defined "classes" of them. This is novel indeed, without a shred of support in prior decisions of this Court or in the provisions of the Administrative Procedure Act on which the court relied.

The court started with this Court's well-established doctrine that a licensing agency may prescribe, by rulemaking, specific standards, within the ambit of the general statutory standards governing licensing ("public convenience and necessity," etc.), to be met by applicants for licenses, which

if not met permit the agency to refuse to entertain the applications. *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956); *FPC* v. *Texaco, Inc.*, 377 U.S. 33 (1964).

But the case here was not an instance of a threshold refusal to entertain a license application failing to meet prescribed standards. Both the combination carriers and the all-cargo carriers already had unrestricted authority under their licenses to transport freight, and the tariff rates and rules under which it would be carried were subject only to the rate regulation power of the Board.

The court below brushed this aside as a "fortuitous" circumstances. (App. A, p. 21a, *infra.*) *Storer* and *Texaco* it thought, would warrant the imposition by rulemaking of restrictions on existing authority exactly as they warrant placing limitations, by rulemaking, on authority that may be applied for. Only one decision of this Court was cited for this reading of *Storer* and *Texaco;* that decision was in a case long antedating either of them, *National Broadcasting Co.* v. *United States,* 319 U.S. 190 (1943). But in that case the challenge was to the substantive power of the FCC to promulgate its chain-broadcasting regulations, *id.* at 209-10, which had been the subject of exhaustive hearings in which sworn testimony was taken, *id.* at 204-05. As this Court said, there was "no basis for any claim that the Commission failed to observe procedural safeguards required by law . . . ," *id.* at 225. Moreover, the chain-broadcasting regulations there involved did not by their own force modify any outstanding license; exactly like the regulations at issue in *Storer* and *Texaco,* they set up standards for passing on future applications.[7] Indeed, a week

[7] The court below said that the chain-broadcasting regulations required some radio station licensees to change their business practices "to avoid revocation or at the very least non-renewal of licenses." (App. A, p. 20a n.12, *infra.*) Under the scheme of licenses of limited duration that prevails under the Communications Act an applicant for renewal stands on the same footing as

after the *National Broadcasting* decision was handed down this Court held in *FCC* v. *National Broadcasting Co.* (*KOA*), 319 U.S. 239 (1943), that a radio station licensee for a frequency that, at the time the license was issued, was a clear channel under the Commission's rules was entitled to the benefit of the statutory procedures for modification when the Commission undertook to subject the frequency to interference by a change in the clear-channel rules made in a rulemaking proceeding.

The distinction between the *National Broadcasting* and *KOA* cases is the difference between rulemaking limiting the terms of a license that may be applied for—which is permissible—and rulemaking limiting authority already possessed—which is not permitted where, as in this case, a statute requires a hearing before a license is modified. This distinction is not "fortuitous" as the court below said. It has been strictly adhered to both by the FCC and by the courts in reviewing FCC decisions; this adherence is illustrated by another of the cases invoked (somewhat uncertainly) by the court below for its novel proposition, *Trans-*

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an original applicant, so that a regulation that seps up standards for renewal is not a modification of an existing license. As for revocation, it is true that the Communications Act provides that a station license may be revoked for reasons that would warrant the Commission's refusal to grant a license. See Columbia Broadcasting System, Inc. v. United States, 316 U.S. 407, 415 (1942). But the chain-broadcasting regulations by their own force did not revoke in part or modify any station licensee's authority. Upon disclosure of a failure to comply with the regulations the statutory procedures for revocation could have been invoked, but they would have had to be pursued before revocation was effective. Indeed, in the *Columbia Broadcasting* case, which held the chain-broadcasting regulations immediately reviewable, the Court ruled that they were reviewable under the section of the Communications Act providing for suits to enjoin orders of the FCC other than orders for, among other things, grant, denial or modification of radio station licenses. The reason was that "the Commission's order neither grants, denies nor modifies any license . . .." 316 U.S. at 416.

continent Television Corp. v. *FCC*, 308 F.2d 339 (D.C. Cir. 1962).[8] The other two cases cited by the court are discussed in the margin.[9]

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[8] See also, *e.g.*, Pacific FM, Inc. v. FCC, D.C. Cir. No. 19710, decided April 14, 1966; The Goodwill Stations, Inc. v. FCC, 325 F.2d 637 (D.C. Cir. 1963).

[9] Airline Pilots Ass'n v. Quesada, 276 F.2d 892 (2d Cir. 1960), upheld the validity of a rule barring pilots over 60 from flying scheduled aircraft. That rule was promulgated by the Administrator of the Federal Aviation Agency, whose actions respecting existing licenses are not subject to § 401(g) of the Federal Aviation Act and who has broad powers to act summarily in the interest of safety; the rule was applied to pilots whose licenses specifically provided, as the dissenters below pointed out, "that their duration was as set out in current regulations." (App. A, p. 35a, *infra*.) The case is, as the dissenters said, "even less apposite" than the decisions of this Court upon which the majority of the court below relied. *(Ibid.)*

In Capitol Airways v. CAB, 292 F.2d 755 (D.C. Cir. 1961), a "blanket exemption" for military business had been issued under § 416(b) of the Act for a limited term applicable to all air carriers. Section 416(b) authorizes the Board to exempt carriers from, among other things, the certificate requirement of § 401. Exemptions can be granted or denied and, so far as the statute is concerned, modified or revoked without a hearing. The Board allowed the "blanket exemption" to expire and by rulemaking substituted a policy of entertaining individual requests for exemptions to perform operations for the military. The Court of Appeals upheld the Board's action; all that was decided was that the petitioners in that case were not entitled to an evidentiary hearing on their applications for renewal of the blanket exemption. Petitioners' argument proceeded on the assumption that they had license rights to provide the service covered by the exemption order that could not be suspended or modified without an evidentiary hearing; their contention was that the Board likewise could not refuse to renew those license rights without an evidentiary hearing. The court rejected this contention. It did not have to reach and did not reach the petitioners' assumption, which alone might be relevant to this case.

Some air carriers do not have certificates but operate wholly pursuant to § 416(b) exemption. Even in the case of such car-

Nonetheless the court below held that the critical question is whether agency action singles out one person for treatment or is applicable to all within its jurisdiction or a reasonable class thereof. In the former case, the court said action is "adjudication" under the Administrative Procedure Act; if it is the latter and if it looks to the future it is "rulemaking" under the Administrative Procedure Act. Since here the Board modified the authority of a class of carriers for their future operations and did not confine its modification to a single carrier, it was concluded that the case was one for "rulemaking" under the Administrative Procedure Act. In fact the lower court went so far as to insist that "adjudication" must be not only "individual in impact" but also "condemnatory in purpose." (App. A, p. 25a, *infra.*) Anything else is "rulemaking."

This grossly misreads the Administrative Procedure Act. For that statute defines "licensing" to include the modification of a license, and "adjudication" includes licensing. §§ 2(d), (e). That the combination carriers suffered a modification of their license authority cannot be gainsaid; only so could their tariffs be "rejected." The Board's action was Administrative Procedure Act "adjudication."

Armed with its novel distinction between the one and the several, the court below blandly disposed of the *Delta* case on the ground that the " 'security of route' principle" so emphasized in this Court's opinion gives protection to a carrier only against agency action "addressed against it individually . . . ." (App. A, p. 26a, *infra.*) But there is

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riers the Court of Appeals for the Ninth Circuit has said that if by certain Board regulations the terms of exemption authority were changed in a manner adverse to exempted carriers "adjudicatory proceedings were necessary, and since none were had the regulations would be invalid . . .." Great Lakes Airlines v. CAB, 291 F.2d 354, 366 (9th Cir. 1961), *cert. denied,* 368 U.S. 890 (1961). See also CAB v. American Air Transport, 201 F.2d 189 (D.C. Cir. 1952), *certified question dismissed,* 344 U.S. 4 (1952).

not the slightest suggestion in the *Delta* opinion that the Court's concern with the security of air carriers' routes was dictated by the fact that only a single carrier was involved. Section 401(g) does not distinguish between modification of one carrier's certificate and modification of the certificates of a group of carriers. Surely the broadax is no less dangerous than the scalpel.

The reasoning of the court below would validate a decree by the Board, in the form of a "policy statement," that only all-cargo carriers can carry freight in freighter aircraft, the goal of the all-cargo carriers' White Paper. It thus puts it in the power of the agency to create by fiat a monopoly in a whole segment of air transportation, wiping out the combination carriers' investment in all-cargo service that is now mounting toward a billion dollars. In precisely the same way the decision below would validate a Board fiat that only one group of carriers could provide coach passenger service. Or the Board by fiat could determine that only local-service carriers, and not trunk carriers, could provide turn-around service, passenger or cargo, between cities less than a given distance from each other. Compare *CAB* v. *Delta Air Lines,* 367 U.S. 316 (1961).

And the decision below has an impact reaching beyond air transportation. The procedures of the FCC, carefully geared to the rule of the *KOA* case, could be revolutionized. So of the ICC and the FPC. The license, which is the foundation for investment in regulated areas of the economy, would become sheer sand whenever an agency's opinion writers could find a policy for all or a class of licensees, a task that on the lower court's view requires very little ingenuity.

Nothing in what the court below referred to as the "malaise" of the administrative process justifies the

Board's procedure here.[10] The court was influenced by Dean Landis' suggestion that initial licensing involves functions "more truly planning than adjudicatory," which have been "forced too rigidly into the latter mould." Landis, *Report on the Regulatory Agencies to the President-Elect* 18 (1960). (App. A, p. 24a, *infra.*) But this Court's decisions in *National Broadcasting, Storer* and *Texaco* offer abundant opportunity for agencies to engage in policy planning by setting up standards that must be met at the threshold by license applicants. Similarly, the reference in the decision below to dissatisfaction with the agencies' handling of "protracted cases" does not support the court's position. (App. A, pp. 24a-25a, *infra.*) The Committee on Rule Making of the Administrative Conference of the United States in its report on ratemaking made important suggestions for the improvement of adjudicatory procedures, which is the direction in which reform properly lies.[11] That committee rejected the idea of action by fiat,

[10] Whatever "malaise" may exist in the administrative process arises not from giving regulated firms the procedural rights prescribed for them by Congress, but rather from the failure of some agencies to develop rational standards that would lead to consistent, fairly predictable decisions, instead of unarticulated shifts of policy on an *ad hoc* basis. See Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards*, 75 Harv. L. Rev. 863, 1055, 1263 (1962).

[11] Administrative Conference Committee on Rule Making, *Improvement in the Conduct of Federal Rate Proceedings*, S. Doc. No. 24, 88th Cong., 1st Sess. (1963); Cramton, *Some Modest Suggestions for Improving Public Utility Rate Proceedings*, 51 Iowa L. Rev. 267 (1966). See also Auerbach, *Scope of Authority of Federal Administrative Agencies to Delegate Decision-Making to Hearing Examiners*, 48 Minn. L. Rev. 823 (1964); Jones, *Licensing of Domestic Air Transportation*, Part I, 30 J. Air L. & Com. 113 (1964), Part II, 31 J. Air L. & Com. 89 (1965); Nathanson, *Looking Backward, 2000-1963: A Personal View of the Administrative Conference, 1961-62*, 16 Ad. L. Rev. 33 (1963); Ross, *The Big Administrative Proceeding: A Response to Mr. Westwood*, 51 A.B.A.J. 239 (1965). Contrary to the disparaging view of administrative adjudication expressed by the court below, many leading commentators have stressed the value and importance of adjudication in the development, as well as the application, of agency

exactly what the Board did here. Administrative Conference Committee on Rule Making, *supra* note 11, at 80-81; Cramton, *supra* note 11, at 272-73. And the confinement of action by fiat to action affecting "classes" of licensees is an illusory limitation, as shown by what has developed in this case: the favored class today consists of a single carrier. Airlift International, now the only other domestic all-cargo carrier, does not compete with Flying Tiger and has not instituted a blocked space rate.

(d) Petitioners' objection to the Board's proceeding by fiat is not, as the court below would have it, "a broad conceptual demand for an adjudicatory-type proceeding," made, as the court implies, solely in the interest of delay and without any proffer of what would be proved on an evidentiary record. (App. A, p. 29a, *infra*.) The purported factual justifications for the Board's policy statement appeared only when the policy statement itself was finally issued at the end of the so-called rulemaking proceeding. There was no opportunity to offer the data that would disprove them.

Every significant fact that the Board found or conclusion that it reached in its policy statement was subject to refu-

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policy. See, *e.g.*, Auerbach, *Some Thoughts on the Hector Memorandum*, 1960 Wis. L. Rev. 183; Auerbach, *Should Administrative Agencies Perform Adjudicatory Functions?*, 1959 Wis. L. Rev. 95; Cary, *Why I Oppose the Divorce of the Judicial Function From Federal Regulatory Agencies*, 51 A.B.A.J. 33 (1965); Cohen & Rabin, *Broker-Dealer Selling Practice Standards: The Importance of Administrative Adjudication In Their Development*, 29 Law & Contemp. Prob. 691 (1964); Kintner, *The Current Ordeal of the Administrative Process: In Reply To Mr. Hector*, 69 Yale L.J. 965 (1960); Loevinger, *The Administrative Agency As a Paradigm of Government—A Survey of the Administrative Process*, 40 Ind. L.J. 287 (1965); Massel, *The Regulatory Process*, 26 Law & Contemp. Prob. 181 (1961). See also Davis, *Separation of Judicial Functions of Administrative Agencies*, 26 ICC Prac. J. 773 (1959); Elman, *Agency Decision-Making: Adjudication By the Federal Trade Commission*, 19 Food Drug Cosm. L.J. 508 (1964); Nathanson, *American Administrative Law*, 6 J. Soc'y Pub. T.L. (N.S.) 39 (1961).

tation. The Board's "findings," stated in the most conclusory of terms, concerned matters that are typically the subjects of licensing or ratemaking proceedings had upon an evidentiary record. Among other things, the Board said that blocked space service promised a breakthrough into cargo traffic that now moves on surface carriers, that there was probably not enough such traffic to go around among all the air carriers and that to give the all-cargo carriers a blocked space monopoly would strengthen them while at the same time the combination carriers would not be injured in any important way because (1) there would be a shift of small-package business to them and (2) the general increase in traffic brought about by blocked space rates would inure to their benefit.[12] To suggest, as the lower court appears to do, that such issues are not enlightened by evidentiary hearings is to betray a cynicism about the hearing process that mocks the principal business of the great regulatory agencies. And in this instance, given the opportunity for normal hearing procedure, it is certain that helpful light would have been shed on critical issues of fact and economics, including light that would have come from shippers and other important community interests. They, in the end, have the greatest stake in healthy and fair competition in the transport system; they never had a chance to be heard at all.

The court below focused on one issue that would have been raised by the combination carriers had they had the opportunity, the effect that excluding them from blocked space service would have upon their business. The court said that when the combination carriers are able to prove injury "based in significant measure on actual relevant

[12] A number of the propositions advanced by the Board in support of the all-cargo carrier monopoly of blocked space service are belied by the currently effective Flying Tiger tariff. Under it, for example, there is no reason for a shift of small-package business to the combination carriers; and rates just 3% below ordinary rates will not produce any breakthrough or general increase in traffic. (See *supra*, pp. 13-14.)

experience, they will have a remedy available to vindicate their asserted rights, both before the Board and on judicial review in case of dissatisfaction with the Board's action or inaction." (App. A, p. 31a, *infra.*) But the basis for review of an agency's refusal to entertain a proposed amendment of a rule is—to say the least—slippery if not illusory.[13] In any event, unlawful agency action cannot be upheld on the ground that unspecified means are available for unspecified relief after injury has been consummated. The ratecutting weapon in Flying Tiger's hands is a potent one that can be rapidly wielded.

2. Despite the Board's and the lower court's treatment of the problem in this case as one of determining the carriers' authority, it may be said with reason that in essence the Board was undertaking to regulate rates. As we have seen, the uniqueness of the so-called blocked space "service" defined in the Board's policy statement lies only in the permissible rate discount. Rates, however, are regulated by the Board not under its licensing powers but under other sections of the Act, as it has insisted heretofore.[14] As rate

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[13] *Cf.* Nolde & Horst Co. v. Helvering, 122 F.2d 41, 44 (D.C. Cir. 1941); Dow v. Ickes, 123 F.2d 909, 913 (D.C. Cir. 1941), *cert. denied*, 315 U.S. 807 (1942); Crooker v. SEC, 161 F.2d 944 (1st Cir. 1947); NLRB v. Tennessee Prods. & Chem. Corp., 329 F.2d 873 (6th Cir. 1964), *cert. denied sub nom.* Clower v. NLRB, 379 U.S. 833 (1964); Minnesota v. United States, 238 F. Supp. 107 (D. Minn. 1965); Amendment of Section 3.606, Table of Assignments, Television Broadcasting Stations (Champaign, Ill.), 16 P. & F. Radio Reg. 1634b, 8 Ad. L.2d 870 (1958); In re Potomac Broadcasting Corp. (WPIK), 6 P. & F. Radio Reg. 559, 564 (1950).

[14] When carriers sought certificates for "coach" service, as if such service was something separate from general air service for licensing purposes, the Board held that "air-coach service involves a decision as to the appropriate pricing of one of the natural products of air line operation. Basically this poses, not a new route or new service problem, but a rate problem—a decision as to what fares should be charged." Transcontinental Coach-Type Service Case, 14 C.A.B. 720, 722 (1951).

regulation, the Board's action is palpably illegal, which is no doubt a reason that the Board did not so treat its action. (*Supra,* pp. 18-19.)

(a) Section 404 of the Federal Aviation Act imposes upon carriers the duty of maintaining rates that are reasonable and non-discriminatory. That duty is enforced by the Board under Section 1002, which provides for investigations of rates on evidentiary records, cancellation if they are found unlawful and the prescription of lawful rates. Section 1002 also allows the Board to suspend rates shown in tariff changes but only for a maximum period of 180 days and only for the purpose of holding an investigation of the lawfulness of the rates. Section 403 requires the filing and observance by the carriers of tariffs showing their rates and empowers the Board to reject tariff changes that do not comply with regulations issued under Section 403(a) prescribing the contents, form and manner of filing and publication of tariffs. Nothing in Section 403 gives the Board power to reject tariffs because the rates shown are not in accord with substantive rate standards.[15] These provisions of the Federal Aviation Act are in a familiar pattern also found in the several parts of the Interstate Commerce Act. *E.g.,* §§ 216-17, 49 Stat. 558 (1935), *as amended,* 49 U.S.C. §§ 316-17.

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[15] Section 403(a) authorizes the board to reject tariffs that are not in conformity with the section or with regulations issued under the section. At the time of the rejection of petitioners' tariffs, the tariff regulations under § 403(a) did not provide for rejection of a tariff showing rates for a service a carrier was not authorized to perform. The regulations have since been amended so to provide. 14 C.F.R. § 221.7 (1966).

In Charter Flight Tariff Investigation, 15 C.A.B. 921 (1952), *aff'd sub nom.* Flying Tiger Line v. CAB, 204 F.2d 404 (D.C. Cir. 1953), the Board used the statutory evidentiary investigation procedure to determine that a tariff should be cancelled because of a carrier's lack of authority to provide the service the tariff covered, which was the basis for the rejection of petitioners' tariffs in the present case.

The Court of Appeals for the Third Circuit in *Mississippi River Fuel Corp.* v. *FPC*, 202 F.2d 899 (3d Cir. 1953), *cert. dismissed*, 345 U.S. 988 (1953), held, under analogous provisions of the Natural Gas Act, that an agency may not reject tariffs as a means of enforcing rate regulation standards or policies. If the Board's action is viewed as attempted rate regulation by tariff rejection, the decision below squarely conflicts with that decision of the Third Circuit.

(b) The Board's action is explicitly designed to prevent carriers, authorized to compete with each other, from competing "on an equal footing"—as the Board's dissenting members said. (R. 149, J.A. 85, quoting from *Air Freight Case*, 10 C.A.B. 572, 603 (1949).) The petitioners are subjected, in effect, to a minimum rate—the regular rate level; their competitor, Flying Tiger, is permitted to carry freight at rates below that floor.

This matter is dealt with in the most cavalier fashion by the court below. After recognizing that "competitors in a regulated industry should be treated similarly in rate rulings in order to preserve competition" the court contented itself with asserting that nonetheless carriers may be reasonably classified and different rates authorized for the different classes. Its authority, significantly, was "See generally" the *Storer* and the *National Broadcasting* cases. (App. A, pp. 17a-18a, *infra*.)

It need hardly be said that the *Storer* and *National Broadcasting* cases had nothing whatever to do with rate regulation or with the classification of persons regulated. But there are pertinent precedents; and they condemn the stand of the court below. Those are the precedents to which we have already referred, bearing this Court's authority, *supra* p. 19, which hold that in rate regulation different requirements for competitors, even intermodal competitors, can be allowed only upon specific evidence and findings pertinent to rate questions—that is, evidence, and findings

based on the evidence, as to differing costs, movement of traffic, inherent advantages enjoyed by the carrier or carriers in question, and so on. Given rates within the zone of reasonableness, competitors are free to compete. The Board itself has stated the principle forcefully: "It is a fundamental rate-making principle that once a rate level is established . . . all the carriers are free to meet that rate." CAB Order No. E-20543, March 6, 1964, p. 3. That principle is shattered by the Board's decree here that, without an examination of the lawfulness of the petitioners' tariffs under substantive rate regulation standards, it will refuse to accept them but will at the same time allow a competitor to publish the reduced blocked space rates.

3. If, contrary to this Court's precedents and what we have said above, the Board was empowered to act as it has by rulemaking to achieve its policy goal of eliminating or reducing competition for volume freight shipments, the rulemaking procedure it followed was bound to comply with Section 4 of the Administrative Procedure Act. It did not.

The court below said that "the procedure followed by the Board admittedly complies fully with the requirements for rule making established in section 4 of the Administrative Procedure Act . . .." (App. A, p. 15a, *infra.*) The statement is inaccurate. The procedure the Board followed was as we have described it, and petitioners did not admit that it complied with Section 4. As they consistently asserted, it was in blatant violation of Section 4.

Section 4(a) requires notice of proposed rulemaking; that notice must include either the terms or substance of the proposed rule or a description of the subjects and issues involved and a reference to the authority under which the rule is proposed. Section 4(b) requires that after notice as required by Section 4(a) there be an opportunity for interested persons to submit written data, views or argument. The requirements are inapplicable to "general statements of policy."

The Board's "general statements of policy," denominated "Statements of General Policy," are included in Part 399 of its Regulations. 14 C.F.R. §§ 399.1-.91 (1966). Section 399.4, one of the introductory provisions of this Part, states that "changes in policy may be made with or without advance notice to the public . . ." This is consistent only with the view that the remaining provisions of Part 399 are intended as guidance to interested persons, see § 399.1, and not as rules of law. This indeed has been the Board's practice.[16] In this prior practice the Board followed the concept of the policy statement enunciated in the authoritative Attorney General's Manual on the Administrative Procedure Act (1947). In its discussion of Section 4, the Manual offers a "working" definition of "general statements of policy" as distinguished from "substantive rules" and "interpretative rules"—"statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power." P. 30 n. 3.

Thus when the notice of rulemaking in this case specified that an amendment to Part 399 was proposed, it was not notice that a substantive rule was contemplated. Only one brief paragraph of the notice discussed the blocked space proposal; it said only that there would be benefit to all-cargo carriers and to combination carriers if the former

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[16] CAB Order No. E-12191, Feb. 19, 1958, dismissed a motion to review a staff dismissal of a complaint charging violation of the Transatlantic Charter Policy, a provision of Part 399; the CAB dismissed the motion on the ground that "failure to comply with the terms of the Policy could not be regarded as a violation of any regulation . . ." Another provision of Part 399, § 399.33 (a), sets forth the conditions under which the Board allows off-peak reduced fares. In two cases where tariffs were filed raising questions as to compliance with the off-peak policy the Board did not reject the tariffs but conducted regular rate investigations and finally determined the legality of the tariffs with ultimate reference to the statutory rate standard; it did not treat the policy statement as a substantive regulation. Delta Off-Peak Coach Fares, CAB Order No. E-20268, Dec. 16, 1963; American Airlines Off-Peak Coach Service, 28 C.A.B. 25 (1958).

were permitted to sell blocked space to the latter. (R. 186, J.A. 122.) And the specific proposal in the policy statement was a single sentence, headed "pooling arrangements of certificated air carriers," saying merely that it "is the policy of the Board" to permit wholesaling of space by the all-cargo carriers to the combination carriers. (R. 192, J.A. 128.) No statutory authority was cited. (Other portions of the notice dealt with important substantive amendments to the Board's charter regulations, which are in another part of the Regulations and are enforceable as substantive rules of conduct.)

After written comments were received a notice of argument was issued. With no explanation this notice broadened the proposed policy to include approval of the sale of blocked space to shippers, including forwarders, by the all-cargo carriers—but still it was only a proposed Statement of General Policy. (R. 201-04, J.A. 137-40.) Even in the end the Board spoke in the statement it finally issued only in terms of its policy. (R. 144, J.A. 80.)

Such a statement of policy has a place in agency administration. Policy rules, as Judge Friendly and other students, including the Committee on Rule Making of the Administrative Conference in its report on ratemaking, have said, can contribute to the coherence of agency process.[17] They serve to put the public on notice as to the agency's views in its administration of provisions concerning pooling (such as Section 412 of the Federal Aviation Act), ratemaking, acquisitions and mergers and so on.

And even after the adoption of the statement of policy the Board treated it as precisely that. It made the policy statement effective immediately without finding or stating any "good cause" for immediacy, even though Section 4(c) of the Administrative Procedure Act requires that "any substantive rule" (with an exception for "statements of

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[17] See, *e.g.*, Administrative Conference Committee on Rule Making, *supra* note 11, at 113; Cohen & Rabin, *supra* note 11, at 1296-97; Fuchs, *Agency Development of Policy Through Rule-Making*, 59 Nw. U.L. Rev. 781 (1965).

policy") be published no less than 30 days before its effective date unless good cause for an earlier effective date is "found and published with the rule." Further, the Board suspended the tariff of the petitioner United, as it ordinarily would a tariff that raised a policy question, and included United's tariff in the rate investigation where its lawfulness would be determined by the statutory criteria. (R. 156-58, J.A. 92-94.)

But then in the Board's order reversing itself on the tariff suspensions, and determining that the tariffs should be rejected, the Statement of General Policy became something quite different. (R. 158-60, J.A. 94-96; App. C, pp. 42a-44a, *infra*.) It became a definitive statement of the carriers' authority, a rule of law.

Such a regulation can be adopted, under Section 4, only after notice and opportunity for written comment. It is plain that those requirements were not complied with. The original notice spoke only of a policy to "encourage" a species of pooling between all-cargo and combination carriers. After written comments, oral argument was noticed on that question and the further question whether policy should be to permit sale by the all-cargo carriers of blocked space to shippers. There was no opportunity for written comments on that further question. All that was allowed the combination carriers was 45 minutes of oral argument. (Unprinted Tr. 1882.) Thereafter the policy statement adopted dealt not only with the policy of permitting the all-cargo carriers the privilege indicated but also with the denial of the privilege to the combination carriers. And then what had been proposed and processed and treated even after its adoption, in the suspension of United's tariff, as a policy statement not subject to Section 4, became, with the tariff rejection, a substantive rule—which had been adopted without complying with Section 4.

This Court lately affirmed a three-judge court's decision that action of the ICC must be set aside for failure to comply with the notice requirements of Section 4, where the

Commission had a proceeding to determine the legality of the application of a previously-prescribed general rule to specified situations and concluded, without formal notice that it intended to do so, by repealing the rule. *Chicago, B. & Q. R.R.* v. *United States,* 242 F. Supp. 414 (N.D. Ill. 1965), *aff'd per curiam,* 382 U.S. 422 (1966). There it was argued on behalf of the agency, as it was argued to the court below in this case, that there was abundant prior actual notice to the persons complaining of the sweeping action the agency finally took. The three-judge court held that notice could not be ascribed to the plaintiffs because of their mere participation in the limited proceeding and added, "Parties to proceedings cannot be expected to grope through the litigation." *Id.* at 417.

Whatever may be the proper role of rulemaking in the disposition of interests and issues as large as those involved in this controversy, this Court should determine whether there should be countenanced a procedure so ill-calculated as the procedure followed here to notify interested persons of what was afoot and to provide the Board with the data and insights it needed. At stake, to take only the interests of the combination carriers and leaving aside those dependent on their cargo services, including important cities and shippers not even served by Flying Tiger, was the investment of more than $400,000,000 they already had made in all-cargo service, and the hundreds of millions more they were and are in the process of making. This investment has been built up in 22 years of promotion by them of the all-cargo business, under a regulatory regime in which the Board has been at pains to foster competition "on an equal footing" between all the carriers, combination and all-cargo alike. (R. 146-51, J.A. 82-87.)

Agency procedure has been of a far different and more responsible kind in the cases where this Court has upheld the validity of rules that have affected vital interests. In *National Broadcasting Co.* v. *United States,* 319 U.S. 190 (1943), 73 days of public hearings had been held, with 96 witnesses, before the chain-broadcasting rules were promulgated. In *American Trucking Ass'ns* v. *United States,*

344 U.S. 298 (1953), 80 witnesses were heard in evidentiary proceedings before the ICC's tripleasing rules were promulgated. The multiple ownership rules in *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956), were based on insights gained in a series of adjudicatory proceedings and full-scale rulemaking complying with Section 4 of the Administrative Procedure Act. In *FPC* v. *Texaco, Inc.*, 377 U.S. 33 (1964), the issue of escalation clauses in natural gas contracts had been the subject both of adjudication and a proper Section 4 proceeding.

Here there was nothing but the 45 minutes of oral argument allowed to the combination carriers—and even that was after a notice of argument specifying only one side of the coin.

CONCLUSION

For the foregoing reasons, the writ of certiorari should issue.

Respectfully submitted,

HOWARD C. WESTWOOD
WILLIAM H. ALLEN
EDWARD J. GRENIER, JR.
701 Union Trust Building
Washington, D.C. 20005

CARL S. ROWE
25 Broadway
New York, N. Y. 10004

WARREN E. BAKER
640 Shoreham Building
Washington, D.C. 20005

H. TEMPLETON BROWN
ROBERT L. STERN
FLOYD M. RETT
231 South LaSalle Street
Chicago, Illinois 60604

Attorneys for Petitioners

Of Counsel:

COVINGTON & BURLING

CHADBOURNE, PARKE, WHITESIDE & WOLFF

MAYER, FRIEDLICH, SPIESS, TIERNEY, BROWN & PLATT

June 1966

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18833

AMERICAN AIRLINES, INC., *Petitioner*

v.

CIVIL AERONAUTICS BOARD, *Respondent*
THE SLICK CORPORATION,
AIR FREIGHT FORWARDERS ASSOCIATION,
THE FLYING TIGER LINE, INC., *Intervenors.*

No. 18834

TRANS WORLD AIRLINES, INC., *Petitioner*

v.

CIVIL AERONAUTICS BOARD, *Respondent*
THE SLICK CORPORATION,
AIR FREIGHT FORWARDERS ASSOCIATION,
THE FLYING TIGER LINE, INC., *Intervenors.*

No. 18840

UNITED AIR LINES, INC., *Petitioner*

v.

CIVIL AERONAUTICS BOARD, *Respondent*
THE SLICK CORPORATION,
AIR FREIGHT FORWARDERS ASSOCIATION,
THE FLYING TIGER LINE, INC., *Intervenors.*

On Petitions for Review of Orders of
The Civil Aeronautics Board

Decided April 15, 1965

* * *

Before BAZELON, Chief Judge, and DANAHER and BURGER, *Circuit Judges.*

BURGER, *Circuit Judge:* Under review are two orders of the Civil Aeronautics Board, one (E 21160) permitting intervenor, Slick Airways, a certificated carrier handling freight only, to put into effect a certain tariff schedule of discounts for blocked space to which the shipper becomes contractually committed and a second order (E 21170) rejecting tariff schedules with tariffs the same as Slick's filed by petitioners, who are also certificated carriers, handling passengers as well as freight.

The effect of the first order, as the Board advises in its brief, "is to permit the Slick tariff to become effective pending an investigation of its lawfulness, and the effect of the subsequent second order is to preclude petitioners [American, Trans World Airlines, Inc. and United Air Lines, Inc.] from providing blocked-space service" such as is permitted for Slick.

At the outset we note that the air cargo transportation business since its inception has been carried on by petitioners, who also carry passengers; at some point two other carriers, The Slick Corporation and The Flying Tiger Line, Inc., intervenors here, became certificated as cargo carriers only. Cargo includes property and mail.

In June 1964 intervenor Slick Corporation, one of the all-cargo carriers, filed with the Civil Aeronautics Board a tariff in which it proposed to offer sizable "blocked space" discounts on transcontinental freight shipments. To qualify for such a discount under the tariff a shipper is required to reserve and contract for a certain amount of space for regular use over a given period; having contracted for the space, the shipper is obliged to pay for it whether used or not.

To Slick's proposed tariff petitioners, the three so-called "combination carriers" (authorized to carry both

passengers and freight on a scheduled basis), filed protests on the ground that the proposed discounts were unlawful under the Federal Aviation Act's ratemaking provisions. In addition, the combination carriers filed "defensive" tariffs substantially identical with Slick's in order to meet Slick's competition, should the Board refuse to suspend Slick's tariff pending investigation of its lawfulness or ultimately find it lawful. The Board first suspended all of the tariffs pending investigation.

Orders Under Review

On August 7, 1964, the Board issued Order E 21160, the first of its two orders here under review. That order vacated the suspension of Slick's tariff while leaving inoperative those of petitioners. As its reason for this action the Board adverted to its simultaneously issued "policy statement," known as Reg. No. PS-24: Pt. 399, "approving the *exclusive* right of all-cargo carriers to sell blocked space to combination carriers, air freight forwarders and large volume shippers." (Emphasis added.)

On August 11 the Board entered order E 21170, the second order under review, rejecting petitioners' tariffs pursuant to its policy statement granting to all-cargo carriers the exclusive right to provide blocked-space discounts and dismissing the investigation of petitioners' tariffs.

Contention of Air Freight Forwarders Association

We deal first with the contention of Air Freight Forwarders Association, an intervenor, that the blocked-space concept approved by the Board's policy statement and the Slick tariff will subject its members to unlawful and uneconomic competition by allowing unauthorized persons to engage in forwarding activities. The Association, as an intervenor, may be heard only on the issues posed by the petitions for review. See, *e.g., Columbia Gas Co.* v.

Amer. Fuel Co., 322 U.S. 379, 383 (1944). Those petitions, as will appear, do not challenge the lawfulness of the Slick tariff; and they challenge the Board's blocked-space regulation only incidentally insofar as it formed the basis of the two orders appealed from. Consequently the questions posed by the Association may not be resolved here.

Mootness of Order E 21160

We accept the Board's informal suggestion of mootness at argument, acquiesced in by the combination carriers, as to the propriety of Order E 21160, which vacated the suspension of Slick's tariff. Under the statute, the Board may suspend a tariff for a maximum of 180 days. That time has now run. Moreover, petitioners' objections to Order E 21160 are in a sense superseded by their objections to Order E 21170, with which we deal fully below. We thus do not reach the questions (1) whether this court may review the Board's different treatment, pending examination of lawfulness, of substantially identical tariffs when the ground for the disparity (as does Reg. No. PS-24: Pt. 399) indicates that the Board has decided to deny certain of the tariffs regardless of their lawfulness;[1] and (2) whether there may exist a basis for distinguishing as to reviewability between initial determinations against suspension and orders vacating prior suspensions.[2]

Validity of Order E 21170

We come finally to Order E 21170, which rejected the proposed tariffs of the combination carriers. Petitioners contend that to allow all-cargo carriers to use blocked-

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[1] The Board argues that Arrow Transp. Co. v. Southern R. Co., 372 U.S. 658 (1962), compels a determination that this order is unreviewable.

[2] See, e.g., Amarillo-Borger Express v. United States, 138 F. Supp. 411 (N.D. Tex. 1956).

space discount tariffs exclusively and deny the same right to combination carriers operates in effect to revoke the authority of the combination carriers to transport property, since, so they assert, the result would be to put them out of the cargo business. Under section 401(g) of the Act, certificated authority may not be revoked except for an intentional violation of the Act, an order, rule or regulation issued thereunder, or a provision of the certificate itself. Revocation may only be after notice and hearing, and must be conditioned on the failure of the carrier to mend its ways within a reasonable period set by the Board. It is undisputed that petitioners have not been put through these revocation procedures.

The Board contends, on the other hand, that no adjudicatory proceedings were necessary, since its regulation was a proper exercise of its rulemaking authority under section 416(a) of the Act. That section provides as follows:

> The Board may from time to time establish such just and reasonable classifications or groups of air carriers for the purposes of this title as the nature of the services performed by such air carriers shall require; and such just and reasonable rules and regulations, pursuant to and consistent with the provisions of this title, to be observed by each such class or group, as the Board finds necessary in the public interest.

The Board's policy statement was adopted after rulemaking hearings which the Board tells us led it to believe that its "delineation of roles" of the two categories of carriers would serve the public interest.

In order to find that the Board's action amounts to a revocation of petitioners' certificated authority as cargo carriers, we believe there must be a showing that petitioners would in fact lose a substantial part of their

cargo business, probably to the point where they could not conduct economically feasible operations. There has been no adjudicatory hearing on this question; the rulemaking proceeding did not indicate such a result.

The Board has power to *amend* certificates upon a showing that the public convenience and necessity so require. Such a showing is to be made, after notice, at an adjudicatory hearing. 49 U.S.C. § 1371(g). See *Civil Aeronautics Board* v. *Delta Air Lines,* 367 U.S. 316 (1961). We do not need more evidence than the record reveals to see that the operative effect of the Board's action is to amend the outstanding certificates of petitioners. Indeed the Board concedes the exclusion of petitioners from performing the kind of carriage they were originally certificated to perform and as to which they have made large investments of capital.

The certificates of the all-cargo carriers and those of the combination carriers bestow identical rights and impose identical obligations with respect to the carriage of property. It follows that the two types of carriers must be free to file identical tariffs for the carriage of cargo. By permitting the all-cargo carriers to file blocked-space tariffs the Board acknowledges their present authority to file such tariffs under their existing certificates, which, except as to passenger carriage, are the same as the combination carriers'. By denying the combination carriers the opportunity to file such tariffs the Board in effect amends outstanding certificate authority.

Board Order E 21170 is therefore of no effect because of the Board's failure to hold the hearing required by the Act. No remand on this issue is necessary such as that in *CAB* v. *Amer. Air Transport,* 91 U.S.App.D.C. 318, 201 F.2d 189 (1952), since no issue arises as to the fact of alteration of petitioners' present certificated authority to engage in the same classes of carriage as their long-standing competitors.

FPC v. *Texaco, Inc.*, 377 U.S. 33 (1964),[3] advanced by the Board as supporting its "delineation of roles," is not in point. That case did no more than to uphold the Power Commission's power to provide for summary rejection of contracts with pricing provisions other than those allowed under its regulations. The petitioners there were not being deprived of any authority they had previously exercised; rather, they had submitted applications for certificates of public convenience and necessity which disclosed impermissible pricing clauses. The instant case, in contrast, presents an attempt to abridge existing certificated authority by rulemaking, not the formulation of reasonable, nondiscriminatory criteria to be met as conditions of receiving such authority in the first place. Nor does *Capitol Airways* v. *CAB*, 110 U.S.App.D.C. 262, 292 F.2d 755 (1961), support the Board. The plain implication of that case is rather that where the Board attempts, as here, to separate "sheep from goats" it can do so only by a process of adjudication.

The authorities cited in the dissent do not indicate a contrary result. Indeed, our holding is in full accord with *Great Lakes Airlines* v. *CAB*, 291 F.2d 354 (9th Cir. 1961):

> The question to be determined is whether the terms of such authority . . . were changed adversely to these petitioners by the subsequent action of the Board in adopting the amendatory regulations to which petitioners call attention. If so, adjudicatory proceedings were necessary . . . .

Id. at 366. That case held only that there had been no amendment of carrier authority, as a matter of law, since "the specific prohibitions of the amendatory regulations in question were made for purposes of clarification of

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[3] See generally Comment, 39 N.Y.U.L. Rev. 347 (1964).

practices the Board previously considered violations of the purpose and intent of existing regulations . . . ." *Id.* at 367. The Board, in other words, sought merely to remedy noncompliance with existing binding regulations by promulgation of stricter regulations.

Air Line Pilots Ass'n v. *Quesada*, 276 F.2d 892 (2d Cir. 1960), is even less apposite. That case involved the narrow issue of validity of a rule against pilots' flying scheduled aircraft after age 60; there was no amendment of certificate authority in the sense here involved. The licenses of the pilots specifically provided that their duration was as set out in current regulations. And the Act itself imposes an express duty on the Administrator of the FAA to prescribe reasonable regulations. It was thus in a very narrow and limited context that the court held that an adjudicatory hearing was not required for each pilot.

Cook Cleland Catalina Airways v. *CAB*, 90 U.S.App. D.C. 220, 195 F.2d 206 (1952), similarly provides no warrant for the Board action in this case. We there held that it was proper for the Board to "revoke" petitioner's "license" to operate as an *irregular* carrier under a *blanket exemption* without an adjudicatory hearing, since no such hearing is required by the Act for such exemptions. No one questions that revocation or amendment of the certificated authority of a scheduled carrier may only be the result of an adjudicatory hearing. *Cook Cleland* thus has no bearing on the only question presented here, *i.e.*, whether such revocation or amendment has been attempted by the Board in the guise of rulemaking.

The dissent next suggests that the Board may limit the use of the blocked-space concept to the all-cargo carriers on an experimental basis for some temporary period. But the Board's exclusion does not purport to be temporary; only its oral argument suggests a time limitation. Moreover, even if the challenged action were limited

to an experimental period, that could not justify a breach of the Act by the Board. The Board is not free to embark on extra-legal experimentation at the expense of the Act. Not even "temporary" or "experimental" amendments of existing certificated authority are permitted under the Act without adjudicatory procedures. Since we hold the Board's action here amounts to an amendment, it is illegal however ephemeral. *Nebraska Dep't of Aeronautics* v. *CAB*, 298 F.2d 286 (8th Cir. 1962), relied on by the dissent, is not to the contrary. That case upheld the Board's authorization of a temporary suspension of service without a prior hearing; but Section 401 of the Act, there involved, expressly provides for such action. The section concerns abandonment of certificated routes by carriers. It is correct that abandonment is not to be allowed without a hearing, but Congress explicitly provided "the Board may, by regulations or otherwise, authorize such *temporary suspension* of service as may be in the public interest." 49 U.S.C. § 1371(j). (Emphasis added.) This express authority demonstrates that the *Nebraska Department* case is not in point.

The Board's order E 21170 is therefore vacated and the cases are remanded for action in conformity herewith.

Order vacated and cases remanded.

BAZELON, *Chief Judge,* dissenting: Not every action of the Board affecting a carrier certificate is an "amendment" requiring an adjudicatory hearing.[1] The purpose of such hearing is primarily to protect "what has been called 'security of route'—*i.e.*, providing assurance to the carrier that its *investment in operations* would be protected insofar as reasonably possible." *Civil Aeronautics Board* v. *Delta Air Lines*, 367 U.S. 316, 324 (1961) (emphasis in original).

Here the Board explicitly found after submission of evidence and oral argument in rule-making proceedings that the combination carriers' present "security of route" would not be affected by excluding them, at least for the present, from the possible expansion of the air freight market through blocked-space reduced rates. The Board stated that reduced rates would primarily attract freight "now moved on surface carriers" and that the diversion to all-cargo carriers of freight presently on combination carriers would not be "significant."

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[1] See *Great Lakes Airlines* v. *Civil Aeronautics Board*, 291 F.2d 354 (9th Cir. 1961); *Air Line Pilots Ass'n, International* v. *Quesada*, 276 F.2d 892 (2d Cir. 1960). Compare *Civil Aeronautics Board* v. *American Air Transport*, 91 U.S. App.D.C. 318, 201 F.2d 189 (1952), which

> "involved an effort by the Board to separate the sheep from the goats: to let the Large Irregular Carriers which had obeyed the spirit and letter of the Board's regulations remain in business undisturbed, while limiting the operations of those which had violated the authority given them. . . . if the Board proposed to discriminate between carriers in the same group, *characterizing some as law abiders and some as law breakers*, it would be required to afford an evidentiary hearing to those whose operating authority was to be suspended or revoked for cause." [*Capitol Airways* v. *Civil Aeronautics Board*, 110 U.S.App.D.C. 262, 265, 292 F.2d 755, 758 (1961) (emphasis supplied).]

Cf. *Cook Cleland Catalina Airways* v. *Civil Aeronautics Board*, 90 U.S.App.D.C. 220, 195 F.2d 206 (1952).

The court's holding—that the Board "amended" the combination carriers' certificates because they can no longer compete on precisely equivalent terms with all-cargo carriers—has only formalistic logic. In practical terms, there is no significant change in the certificates if the carriers will not be financially affected by the Board's action, and the Board has so found. "Needless to say, we are ill equipped to weigh such predictions of the economic future. Nor is it our function to act as a super-commission." *American Trucking Ass'n* v. *United States*, 344 U.S. 298, 309 (1953).[2] I therefore cannot agree that the Board acted arbitrarily here in adopting, without adjudicatory hearing, a policy excluding combination carriers from offering blocked-space reduced rates.[3]

Moreover, the Board maintains that it has excluded combination carriers from offering blocked-space reduced rates only temporarily. It found that any excess cargo capacity on a carrier offering reduced rates would make such rates economically unfeasible for the carrier. It was

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[2] In *Delta Air Lines, supra*, the Supreme Court held an adjudicatory hearing was required to alter Delta's certificate barring flights Delta was then operating. The Board had found that "no significant adverse effect will result" to Delta from the certificate alteration. The Court disregarded this finding, but unlike the present case, the Board had held no hearing whatsoever before altering Delta's certificate and the alteration in itself clearly threatened Delta's present investments. 367 U.S. at 330. Compare *Standard Airlines* v. *Civil Aeronautics Board*, 85 U.S.App.D.C. 29, 177 F.2d 18 (1949).

[3] The Board's action is authorized by § 416(a), Federal Aviation Act, 49 U.S.C. § 1386(a); "The Board may from time to time establish such just and reasonable classifications or groups of air carriers for the purposes of this subchapter as the nature of the services performed by such air carriers shall require; and such just and reasonable rules and regulations, pursuant to and consistent with the provisions of this subchapter, to be observed by each such class or group, as the Board finds necessary in the public interest."

thus necessary to restrict the number of reduced rate carriers until the present air freight market expanded. The Board chose all-cargo carriers because of their prior specialization in the market and because "the exclusive role of performing blocked-space service will . . . provide them with a needed source of financial strengthening." The Board expects the air freight market to grow in response to the reduced rates and, by implication, the Board will allow combination carriers to offer these rates when the market has grown sufficiently.

Adoption of this experimental, temporary policy does not require the burdens of an adjudicatory proceeding.[4] But in order to insure that the temporary exclusion of combination carriers from blocked-space reduced rates will not become permanent by default, I would affirm the Board's action without prejudice to the combination carriers' right to reopen the question of their exclusion upon sufficient showing to the Board that their present cargo business was being adversely affected, or that the air freight market had sufficiently expanded so that they could participate in blocked-space reduced rates.

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[4] For inferential support of this proposition, see *Nebraska Dept. of Aeronautics* v. *Civil Aeronautics Board*, 298 F.2d 286, 292-93 (8th Cir. 1962); *R. A. Holman & Co.* v. *Securities & Exchange Comm'n*, 112 U.S.App.D.C. 43, 299 F.2d 127, *cert. denied*, 370 U.S. 911 (1962). In this court, the Board argued:

> "Certainly the Board should not be required to resort to cumbersome certificate amendment proceedings for the purpose of permitting an effective experiment with a new service concept, with the consequence that still further certificate amendment proceedings would be required to effectuate any change in policy or expansion of the number of carriers to provide blocked-space service. On the contrary, the rule-making method represents the more flexible and desirable method of procedure in this area." Respondent's brief at p. 14.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18833

AMERICAN AIRLINES, INC., *Petitioner*

v.

CIVIL AERONAUTICS BOARD, *Respondent*
THE SLICK CORPORATION,
AIR FREIGHT FORWARDERS ASSOCIATION,
THE FLYING TIGER LINE, INC., *Intervenors*

No. 18834

TRANS WORLD AIRLINES, *Petitioner*

v.

CIVIL AERONAUTICS BOARD, *Respondent*
THE SLICK CORPORATION,
AIR FREIGHT FORWARDERS ASSOCIATION,
THE FLYING TIGER LINE, INC., *Intervenors*

No. 18840

UNITED AIR LINES, INC., *Petitioner*

v.

CIVIL AERONAUTICS BOARD, *Respondent*
THE SLICK CORPORATION,
AIR FREIGHT FORWARDERS ASSOCIATION,
THE FLYING TIGER LINE, INC., *Intervenors*

On Petitions for Review of Orders of
The Civil Aeronautics Board

ON REHEARING EN BANC

Decided March 2, 1966

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Before: BAZELON, *Chief Judge*, FAHY, WASHINGTON*, DANAHER, BURGER, WRIGHT, MCGOWAN, TAMM and LEVENTHAL, *Circuit Judges*, sitting *en banc*.

LEVENTHAL, *Circuit Judge:* On August 7, 1964, the Civil Aeronautics Board,[1] two members dissenting, issued a "policy statement" regulation (PS-24), providing that only all-cargo carriers may provide "blocked space service"—essentially the sale of space on flights at wholesale rates, when "blocked" or reserved by the user on an agreement to use a specified amount of space.[2] Concomitantly, the Board vacated its suspension of a tariff proposing such blocked space service filed by Slick Airways, one of the all-cargo carriers.[3] Defensive tariffs, similar to but not identi-

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* Circuit Judge Washington became Senior Circuit Judge on November 10, 1965.

[1] Hereafter sometimes referred to as the Board, or CAB.

[2] Regulation No. PS-24, dated August 7, 1964, "Statements of General Policy Blocked Space Service," constituting Amendment 3 to Part 399 of the Board's regulations, contains statements of policy adopted by the Board for the guidance of the public, with certain exceptions. Amendment 3 added to Subpart C (Policies Relating to Rates and Tariffs) a new § 399.37, now codified as 14 C.F.R. § 399.37, defining blocked space as follows:

> "Blocked space service" means the carriage of property in all-cargo aircraft at wholesale rates pursuant to an effective tariff stating a rate applicable only when the user reserves and agrees to pay for a specified amount of space or lift on a regularly recurring basis for a period of not less than 60 days.

[3] Order No. E-21160, August 7, entered in Docket 15419. Appellant American Airlines sought a stay of Order E-21160. At the suggestion of this court, and to enable this court to rule on that motion, the Board, by Order E-21166, August 7, 1964, stayed the effectiveness of Order E-21160 to August 17, 1964. On August 14, 1964, a division of this court issued an order staying the effectiveness of the Board's order pending hearing on the merits. On October 20, 1964, this court granted a petition for rehearing en banc of the order granting a stay, vacated the court order of Au-

cal with Slick's, were filed by American Airlines, Trans-World Airlines and United Airlines,[4] petitioners here, who are combination carriers, i.e. carriers authorized to carry persons as well as property and mail.[5] These tariffs were summarily rejected in Order No. E-21170, August 11, 1964, brought before this court on petitions for review.

The CAB's regulation was the culmination of a rule making proceeding (Docket 14148), held pursuant to notice of January 23, 1964, and supplemental notice of June 22, 1964. All interested parties had opportunity, of which petitioners availed themselves, to present their positions to the Board through oral arguments as well as written data, views, and rebuttals. The procedure followed by the Board admittedly complies fully with the requirements for rule making established in section 4 of the Administrative Procedure Act, 5 U.S.C. § 1003. The question before us is whether this regulation effected a modification of petitioners' existing certificates which, under § 401(g) of the Federal Aviation Act, 49 U.S.C. § 1371(g), may be accomplished only after a full adjudicatory hearing. We hold that the regulation was validly issued.

The Board's policy statements in Regulation PS-24, essentially legislative findings and conclusions in support

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gust 14, 1964, and denied motion for stay. Since the maximum time for suspension of a tariff would in any event have expired before the hearing of this case, the order is now moot and will not be reviewed by this court.

In Order E-21160 the Board directed that the investigation into the lawfulness of the Slick tariff in Docket 15419 should proceed.

[4] The Slick tariff which the Board permitted to go into effect imposed a minimum of 200 pounds for shipments. The defensive tariffs filed by petitioners as to the blocked space arrangement contained no such limitation.

[5] This authority exists by virtue of certificates issued under the statutory "grandfather" provision. Civil Aeronautics Act of 1938, § 401(e), 52 Stat. 988.

of its decision,[6] may be summarized as follows: There is a distinction between combination carriers and all-cargo carriers inherent in their certificates and operating responsibilities thereunder. The reservation of blocked space to all-cargo carriers will further their role as specialists for large volume air freight service in all-cargo aircraft. This can be expected to be followed by a shift of small volume shipments to the combination carriers, whose cargo operations supplement their passenger services and who are better suited for meeting the needs of this category of traffic, at less cost. The blocked space traffic, consisting of traffic produced by frequent, regular and high volume shippers, has particular need for a specialized type of service marked, among other things, by low rates, appropriately convenient schedules and assurance that space will be available when needed. A large market of traffic now moved on surface carriers will become available if air carriers achieve a breakthrough in properly servicing such traffic—a breakthrough dependent on development of marketing and performance techniques adapted to serving the peculiar needs of these shippers, and dependent on attraction of high volume of traffic through rate reduction, in turn made possible by improved planning and efficiency.

The Board considered that its statutory responsibility to promote air transportation required it to pursue earliest possible achievement of the breakthrough, and that this depended on assigning the exclusive role of perfecting blocked space service to the specialized all-cargo carriers.

Of particular interest and significance were the following findings and conclusions:

> However, the needed improvement in equipment utilization and load factors cannot be obtained if the

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[6] We use the term "legislative findings and conclusions" to avoid confusion with the "findings and conclusions" required by § 8(b) of the Administrative Procedure Act for adjudications and rules required to be made on the record after opportunity for agency hearing.

traffic from blocked space arrangements is spread too thinly among carriers. Thus, if the blocked space concept is to be given a true test, we must make sure that excessive blocked space capacity is not offered. For this reason in particular, our policy contemplates that only the all-cargo carriers will be permitted to offer blocked space service at this time.

Assigning the all-cargo carriers the exclusive role of performing blocked-space service will, we believe, provide them with a needed source of financial strengthening. We recognize, of course, that some traffic now moving on the cargo services of the combination carriers may be diverted to the blocked space services of the all-cargo carriers, but we do not believe that such diversion would be significant. Moreover, these carriers can be expected to acquire an increasing share of small package shipments. Some traffic now moving on the all-cargo carriers at regular rates will be diverted to their lower blocked space rates. However, there is no reason to believe that attractive blocked space rates and the benefits of specialization will not ultimately bring about an increase in traffic more than offsetting any such diversion.

1. Petitioners say that the Board has no power by summary action, without hearing, to prevent a carrier or group of carriers from competing fully with other carriers. Their reliance on a "fundamental principle" that carriers should be able to compete with each other, though couched here in procedural terms, has overtones of an argument on the merits. At the outset we reject the sweeping argument, if that argument is being made or implied, that such agency action would be invalid even if taken after the most elaborate of procedures. That competitors in a regulated industry should be treated similarly in rate rulings in order to preserve competition is not denied. But that is not to say that reasonable distinctions between

groups of competitors are impermissible, and that different services and rates may not then be authorized for the different groups or classes. Congress made a broad delegation of power to the Board, in § 416(a) of the Act (49 U.S.C. § 1386(a)), to "establish such just and reasonable classifications or groups of air carriers . . . as the nature of the services performed by such air carriers shall require."

Petitioners have made no presentation that the Board's distinction between combination carriers and all-cargo carriers is meaningless or without rational foundation. Congress has given the Board not only a wide regulatory authority, but a specific promotional function to initiate proposals for the purpose of expanding efficient civil aviation transport;[7] the power to classify carriers and service; and the power to issue implementing rules and regulations.[8] This combination of powers, together with the underlying findings and conclusions, suffices to sustain the regulation on the merits, assuming no procedural bar. See generally *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956); *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943).

2. Petitioners claim that § 401(g) of the Federal Aviation Act, 49 U.S.C. § 1371(g), assures them an "adjudicatory hearing" because the Board action amounts to a modification or suspension of existing rights under their certificates of public convenience and necessity.

In essence, petitioners' argument is the same as the thesis this court accepted ten years ago in the *Storer* case,[9] only to be reversed by the Supreme Court.[10] This

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[7] 49 U.S.C. §§ 1302(a) and (f), and 1303(b).

[8] 49 U.S.C. § 1354(a).

[9] *Storer Broadcasting Co.* v. *United States*, 95 U.S. App. D.C. 97, 220 F.2d 204 (1955).

[10] *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956).

court held the multiple ownership rule of the Federal Communications Commission invalid because of the inadequacy of the rule making procedure followed in its adoption, an adjudicatory hearing being expressly guaranteed by statute to applicants for licenses. The Supreme Court, however, held that notwithstanding the statutory hearing requirement the Commission retained the power to promulgate rules of general application consistent with the Act, and to deny an adjudicatory hearing to applicants whose applications on their face showed violations of the rule. *Storer's* vitality is attested by its recent application in *FPC* v. *Texaco*, 377 U.S. 33, 39 (1964),[11] where the Supreme Court stated:

> The statutory requirement for a hearing does not preclude the Commission from particularizing statutory standards through the rule-making process and barring at the threshold those who neither measure up to them nor show reasons why in the public interest the rule should be waived.

Petitioners argue that the *Storer* doctrine is restricted to regulations affecting future applications for new licenses or certificates, whereas here the CAB regulation affected rights under existing certificates. That such a restrictive reading of the *Storer* doctrine is unwarranted, is shown by such decisions as *National Broadcasting Co.*

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[11] The Federal Power Commission had validly adopted a rule prohibiting certain pricing provisions in the rate schedules of independent producers of natural gas, and had summarily rejected applications for certificates of public convenience and necessity which contained rate schedules with provisions running afoul of the Commission's rule. The Court of Appeals for the Tenth Circuit held that the rule could not be applied to deprive a certificate applicant of the adjudicatory hearing guaranteed him by § 7 of the Natural Gas Act. 276 F.2d at 896. The Supreme Court reversed. See, generally Davis, 2 *Administrative Law* § 15.03 (1958).

v. *United States*, 319 U.S. 190 (1943);[12] *Air Lines Pilots Ass'n* v. *Quesada*, 276 F.2d 892 (2d Cir. 1960);[13] and *Capitol Airways, Inc.* v. *CAB*, 110 U.S.App.D.C. 262, 292

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[12] *National Broadcasting Co.* upheld the validity of regulations applicable to radio stations engaged in chain broadcasting. The regulations were issued in 1941 after an investigation and legislative hearings appropriate for rule making (see 319 U.S. at 194-95), but not the adjudicatory-type hearing prerequisite under the Communications Act, even prior to the Administrative Procedure Act, for denial of a license application or modification or non-renewal of license, see *Ashbacker Radio Corp.* v. *FCC*, 326 U.S. 327, 332 (1945). The regulation required radio station licensees engaged in chain broadcasting to alter long-standing business practices—e.g. precluded network affiliation contracts for a term longer than two years—to avoid revocation or at the very least non-renewal of licenses. But the court found (p. 225) that there was "no basis for any claim that the Commission failed to observe procedural safeguards required by law."

[13] The Court upheld the promulgation, without adjudicatory hearings, of a Federal Aviation Agency regulation barring individuals sixty years old from serving as pilots, even though that regulation modified rights under all outstanding licenses and effected a termination without hearing of some outstanding licenses. Rejecting a challenge by pilots relying on the statutory provision, 49 U.S.C. § 1371(g), that an adjudicatory hearing must be provided before an airman's license may be revoked or amended, the court stated (276 F.2d at 896):

> The Administrator's action does not lose the character of rule-making because it modifies the plaintiff pilots' claimed property rights in their licenses and their contractual rights under collective bargaining agreements . . . Administrative regulations often limit in the public interest the use that persons may make of their property without affording each one affected an opportunity to present evidence upon the fairness of the regulation.

F.2d 755 (1961).[14] See also *Transcontinental Television Corp.* v. *FCC*, 113 U.S.App.D.C. 384, 308 F.2d 339 (1962).

The present case is different in particular aspects of the facts or statutory provisions from *Storer* and the other *Storer* doctrine cases. However, the *Storer* doctrine is not to be revised or reshaped by reference to fortuitous circumstances. It rests on a fundamental awareness that rule making is a vital part of the administrative process, particularly adapted to and needful for sound evolution of policy in guiding the future development of industries subject to intensive administrative regulation in the public interest, and that such rule making is not to be shackled, in the absence of clear and specific Congressional requirement, by importation of formalities developed for the adjudicatory process and basically unsuited for policy rule making.

3. The need for and importance of policy rule making made on the basis of a procedure appropriate thereto is clearly identified in the Administrative Procedure Act (APA), 5 USC § 1001 et seq. In general, the APA establishes a dichotomy between rule-making and adjudication. For adjudication a formal system is provided.[15]

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[14] *Capitol Airways* upheld a CAB order amending its rules so as to require "supplemental" air carriers serving military installations to apply for individual exemptions from restrictions on their preexistent operating authority, rather than enjoying a blanket exemption previously in effect under the Board's rules. The court held that this action could be effected without a hearing, although the Board "has redrawn the rules of the game" in such a way that some competitors will survive while others will not. 110 U.S.App.D.C. at 265, 292 F.2d at 758.

[15] Section 5 of the APA in substance provides that the officers who receive the evidence shall make an initial decision, or at least a recommended decision, and prohibits any officer engaged in investigating or prosecuting functions from participating in the decision. It protects the right of cross-examination and the right of presenting oral testimony.

Rule making, however, is governed by § 4, which essentially requires only publication of notice of the subject or issues involved, an opportunity for interested persons to participate through submission of written data, and the right of petition in respect of rules. These more limited requirements are geared to the purpose of the rule making proceeding, which is typically concerned with broad policy considerations rather than review of individual conduct. Compare the Attorney General's Manual on the Administrative Procedure Act (1947), pp. 14-15:

> The object of the rule making proceeding is the implementation or prescription of law or policy for the future, rather than the evaluation of a respondent's past conduct. Typically, the issues relate not to the evidentiary facts, as to which the veracity and demeanor of witnesses would often be important, but rather to the policy-making conclusions to be drawn from the facts. Senate Hearings (1941) pp. 657, 1298, 1451. Conversely, adjudication is concerned with the determination of past and present rights and liabilities. Normally, there is involved a decision as to whether past conduct was unlawful, so that the proceeding is characterized by an accusatory flavor and may result in disciplinary action.
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> Not only were the draftsmen and proponents of the bill aware of this realistic distinction between rule making and adjudication, but they shaped the entire Act around it.

Rule making has a unique value and importance as an administrative technique for evolution of general policy, notwithstanding, or perhaps indeed because of, the freedom from the procedures carefully prescribed to assure fair-

ness in individual adjudication. *SEC* v. *Chenery Corp.*, 332 U.S. 194, 202, 203 (1947).[16]

The regulation under discussion, being an "agency statement of general . . . applicability and future effect designed to implement . . . or prescribe law or policy," plainly satisfies the definition of "rule" in § 2(c) of the APA,[17] as well as general understanding. There is therefore a presumptive procedural validity for the rule making procedure prescribed in § 4 of the APA, unless countermanded by a different Congressional mandate.

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[16] *Chenery* recognizes that an agency may have the discretion to determine how to proceed. The objective of pursuit of the "rule of law" in the administrative process, through development of relatively clear and informative public standards, can be achieved either through rule making or the case-by-case adjudicatory system.

For some statements reviewing the relative advantages and disadvantages of rule making procedures as opposed to adjudication for the development of agency policy, and concluding that increased use of rule making is in the public interest, see e.g. Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards* (1962); Shapiro, *The Choice of Rule Making or Adjudication in the Development of Administrative Policy*, 78 Harv. L. Rev. 921 (1965); Baker, *Policy By Rule or Ad Hoc Approach—Which Should it Be?* 22 Law & Contemp. Prob. 658 (1957).

Judge Friendly in effect suggests (p. 105) that the case-by-case technique as utilized by the CAB has muddied the waters and operated to avoid an overall policy statement of approach to the route structure.

[17] 5 U.S.C. § 1001(c) defines "rule" as meaning "any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." Professor Davis points out that the words "or particular" were inserted after Senate passage in order, said the House Committee, to "assure coverage of rule making addressed to named persons," that the words were not intended to change into rule making what was previously considered adjudication but "to make sure that what has traditionally been regarded as a rule will still be a rule even though it has particular instead of general applicability." 7 Davis, *supra* note 11, § 5.02.

4. Serious questions have been raised concerning the adjudicatory-type hearings required and held on initial licensing involving specific carriers and routes. It has been suggested that air line certificates are an instance where "functions that are more truly planning than adjudicatory have been forced too rigidly into the latter mould," and that officials engaged in planning functions should be "free to use flexible procedures in the search for ideas and policies" rather than be "bound either as a matter of routine or law to pursue procedures ill-adapted for the performance of such a function."[18]

The difficulties currently experienced in the administrative process, sometimes referred to as its "malaise," obviously do not warrant departure from procedures mandated by Congress. But they suggest the need for relative certitude before a court concludes that adjudicatory procedures are required. The need for certitude is underscored if the adjudicatory procedure is to be required on the ground that the proceeding involves an amendment of licensing, for under the Administrative Procedure Act that conclusion results in even more rigorous procedural requirements than apply to initial licensing. Thus, the examiner would not even be free to consult with agency technicians, as he is on initial licenses. And the presentation to the agency heads would have to await an examiner's report and proceed on the basis of exceptions thereto, whereas in initial licensing the agency may omit

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[18] Landis, *Report on the Regulatory Agencies to the President-Elect*, p. 18 (1960).

A leading practitioner before the CAB has even suggested that the breakdown of the administrative process in protracted cases should be overcome by the adoption of a conference-hearing procedure, with virtual elimination of oral testimony, including cross-examination, and hearings confined in substance to conference discussions between lawyers and expert witnesses. Westwood, *Administrative Proceedings: Techniques of Presiding*, 50 A.B.A.J. 659 (1964).

the examiner's report and proceed on the premise that exceptions can be more clearly focused in the light of proposals and views of the senior staff officials. In short, the rigors of the adjudicatory procedure could not even be softened by the exceptions deliberately provided by Congress in the APA in cases of initial licensing (and rule making on the record) in order to provide the flexibility requisite for proceedings principally involving policy determinations.[19]

5. We are not here concerned with a proceeding that in form is couched as rule making, general in scope and prospective in operation, but in substance and effect is individual in impact and condemnatory in purpose. The proceeding before us is rule making both in form and effect. There is no individual action here masquerading as a general rule. We have no basis for supposing that the Board's regulation was based on a sham rather than a genuine classification. The classes of carriers were analyzed both functionally and in terms of capacity for furthering the promotional purposes of the Act. The class of combination carriers is not accorded the same rights as the class of all-cargo carriers, but the difference is in no sense a punishment for sins of commission or omission. They are not, in Judge Washington's phrase, "goats" being separated from favored sheep.[20]

6. Petitioners' contention is not advanced by *CAB* v. *Delta Airlines*, 367 U.S. 316 (1961). Once the Supreme Court made clear that the original certificate order had become final, it was undisputed that the second order,

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[19] See Attorney General's Manual on the Administrative Procedure Act, p. 15 (1947).

[20] *Capitol Airways, Inc.* v. *CAB*, 110 U.S.App.D.C. 262, 265, 292 F.2d 755, 758 (1961). What Judge Washington had in mind was the use of rules as a guise for imposition of sanctions on some parties for violations of the Act, not the kind of distinctions made by the Board here.

addressed to the one carrier (Delta) and prescribing for it a less favorable route than the original order, was an amendment of a certificate for which an adjudicatory hearing is requisite under § 401(g) of the Federal Aviation Act. The "security of route" principle thus gives protection to an individual carrier that has made an investment in order to carry on the certificated service, assuring it that the CAB will not worsen its position by action addressed against it individually, by prescribing inferior routes. Since the Supreme Court gave no indication in *Delta* that it intended to depart from the *Storer* doctrine, we see no basis for reading *Delta* as implying that the mere fact that licenses will be affected renders general rule making an impermissible means of agency action governing all carriers, or an appropriate general class of carriers.

Where the agency is considering an order against a particular carrier or carriers there is protection through the requirement of the adjudicatory procedure appropriate for such individual actions and amendments, a requirement which *Delta* warns will be strictly enforced. Where the agency is considering a general regulation, applicable to all carriers, or to all carriers within an appropriate class, then each carrier is protected by the fact that it cannot be disadvantaged except as the Board takes action against an entire class. For any such class regulation there is also protection outside the field of procedure in that the general regulation must be reasonable both as to the classification employed, and as to the nature and extent of the restriction in relation to the evil remedied or other general public purpose furthered.

7. There may be wisdom in providing for oral testimony, at least in legislative-type hearings, in advance of the adoption of controversial regulations governing competitive practices, even though the need for development

of overall requirements precluded Congressional requirement of such hearings for rule making generally.[21]

This court has indicated its readiness to lay down procedural requirements deemed inherent in the very concept of fair hearing for certain classes of cases, even though no such requirements had been specified by Congress. *Gonzalez* v. *Freeman*, 118 U.S.App.D.C. 180, 334

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[21] Compare pp. 107-08 of the Final Report of the Attorney General's Committee on Administrative Procedure (S.Doc. 8, 77th Cong., 1st Sess.) (1941):

> [Hearings] are now generally held in connection with the fixing of prices and wages, the prescription of rules for the construction of vessels and other instruments of transportation, the regulation of the ingredients and physical properties of food, the prescription of commodity standards, and the regulation of competitive practices. The regulation of all of these matters bears upon economic enterprise and touches directly the financial aspects of great numbers of businesses affected, either by imposing direct costs or by limiting opportunities for gain. Appreciation of these effects, both by businessmen and government officials, seems to be the chief cause of the increased use of hearings in administrative rule making.
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> The Committee believes that the practice of holding public hearings in the formulation of rules of the character mentioned above should be continued and established as standard administrative practice, to be extended as circumstances warrant into new areas of rule making. The difficulty of defining necessary exemptions from any general prescription argues strongly, however, against the wisdom or feasibility of a statutory requirement that hearings invariably precede promulgation of a regulation. . . . Here, as elsewhere in the administrative process, ultimate reliance must be upon administrative good faith —good faith in not dispensing with hearings when controversial additions to or changes in rules are contemplated.

F.2d 570 (1964); *Pollack* v. *Simonson*, —— U.S.App.D.C. ——, 350 F.2d 740 (1965).[22]

However in the present case the CAB did not limit itself to minimum procedures, but rather gave the parties a significantly greater opportunity to persuade and enlighten the Board. It provided not merely for written comment, but in addition for oral argument.[23] The CAB, presumably with the aid of its policy staff, sifted out the dross and delineated key questions on which argument could most helpfully be focused, including the question material to the case at bar.

If additional procedural safeguards are to be imposed as a requirement it would be more salutary to incorporate them into a rule making procedure than to adopt a blanket requirement of an adjudicatory procedure. A rule making setting would better permit confinement of oral hearings to the kind of factual issues which can best be determined in the light of oral hearings, without undue elongation of the proceeding or sacrifice of the expedition and flexibility available in rule making. It would also permit the

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[22] Compare S.Rep.No. 752, 79th Cong., 1st Sess. p. 18 (1945); Administrative Procedure Act, Legislative History, p. 204 (S. Doc. No. 248). The Senate Judiciary Committee, while according to initial licensing certain exceptions from procedural requirements generally applicable to adjudicatory determination "upon the theory that in most licensing cases the original application may be very much like rule making," observed that some cases "tend to be accusatory in form and involve sharply controverted factual issues. Agencies should not apply the exceptions in such cases, because they are not to be interpreted as precluding fair procedure where it is required."

[23] Opportunity for oral argument to the board is not necessarily requisite even in adjudicatory proceedings, *NLRB* v. *Clausen*, 188 F.2d 439 (3rd Cir.), *cert. denied*, 342 U.S. 868 (1951). Whether it is required by due process depends upon the circumstances. *FCC* v. *WJR, The Goodwill Station*, 337 U.S. 265, 276 (1949).

hearing examiner to confer with experts and the Board concerning "legislative facts" and policy questions.

However, there is no basis on the present record for concluding that additional procedures were requisite for fair hearing. We might view the case differently if we were not confronted solely with a broad conceptual demand for an adjudicatory-type proceeding, which is at least consistent with, though we do not say it is attributable to, a desire for protracted delay. Nowhere in the record is there any specific proffer by petitioners as to the subjects they believed required oral hearings, what kind of facts they proposed to adduce, and by what witnesses, etc. Nor was there any specific proffer as to particular lines of cross-examination which required exploration at an oral hearing.[24]

The particular point most controverted by petitioners is the effect of the CAB regulation on their business. The issue involves what Professor Davis calls "legislative" rather than "adjudicative" facts.[25] It is the kind of issue

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[24] A request for cross-examination is generally of less value when not coupled with a proffer of direct proof, see Westwood, *supra* note 18.

Petitioner United stated in its comments that "if the Board accepts the conclusions of its staff predicated as they are on inaccurate and untested cost estimates, the combination carriers will be penalized and their right to operate all-cargo aircraft somehow impaired." Disputes as to costs frequently involve judgment as to cost allocations, and in such matters, as Justice Brandeis noted long ago, "experience teaches us that it is much easier to reject formulas presented as being misleading than to find one apparently adequate." *Groesbeck* v. *Duluth, S.S. & A.R. Co.*, 250 U.S. 607, 614-15 (1919).

[25] See 1 Davis, *Administrative Law* § 7.02, p. 413 (1958):

> Adjudicative facts usually answer the questions of who did what, where, when, how, why, with what motive or intent; adjudicative facts are roughly the kind of facts that go to a jury in a jury case. Legislative facts do not usually concern the immediate parties but are general facts which help the tribunal decide questions of law and policy and discretion.

involving expert opinions and forecasts, which cannot be decisively resolved by testimony. It is the kind of issue where a month of experience will be worth a year of hearings.

It is part of the genius of the administrative process that its flexibility permits adoption of approaches subject to expeditious adjustment in the light of experience. Although the CAB's regulation is not temporary in the sense of being expressly limited in duration, the Board's findings plainly reflect its assumption that the regulation was intended to be subject to re-examination.[26] The Board's regulations provide that "any policy may be amended from time to time as experience or changing conditions may require." 14 C.F.R. § 399.4. In any event, it is the obligation of an agency to make re-examinations and adjustments in the light of experience.[27]

To avoid any possible misapprehension, our affirmance of the Board's action is without prejudice to the right of the combination carriers to reopen the question of their exclusion upon a showing that the Board's assumptions could not reasonably continue to be maintained in the light of actual experience, that their overall cargo business was significantly impaired, or that the air freight market had sufficiently expanded so that the promotion

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[26] Thus the Board noted its conclusion that expansion to combination carriers was not feasible "at this time." In the accompanying order permitting Slick's tariff to go into effect, the Board stated: "We believe that Slick is proposing a worthwhile experiment which should be tested in the market place. . . . Permitting Slick's tariff to go into effect now will also provide the Board with experience data upon which we may better gauge the effect of the blocked space service during the course of the ensuing investigation." Order No. E-21160, August 7, 1964.

[27] See *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 225 (1943); *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 205 (1956).

of the air cargo industry through blocked space reduced rates would not be imperiled by their participation.

Since our records show that this Court took action more than a year ago to permit the regulation to become effective (see note 3 *supra*), it should perhaps be mentioned that at the argument respondents stated that thus far there had been little blocked space traffic and no significant diversion from petitioners. Petitioners replied that this period has not been a fair test, since the all-cargo carriers may have been awaiting the outcome of the litigation before aggressively exploiting their newly won privileges. It suffices to say that if and when petitioners have a showing to make based in significant measure on actual relevant experience, they will have a remedy available to vindicate their asserted rights, both before the Board and on judicial review in case of dissatisfaction with the Board's action or inaction.

Meanwhile they have been accorded a hearing conforming to and surpassing the minimum required for rule making. They have not been subject to a denial of procedural rights that undermines the validity of the regulation.

Affirmed.

WASHINGTON, *Senior Circuit Judge*, did not participate in this decision.

BURGER, *Circuit Judge*, with whom DANAHER and TAMM, *Circuit Judges*, join, dissenting: Petitioners, three airlines authorized to carry both passengers and cargo on a regular basis, hold certificates for cargo carriage legally identical with the certificate held by Intervenor, Slick Corporation, an all-cargo carrier. Without holding the adjudicatory hearing required by statute before an outstanding certificate may be amended,[1] the Civil Aeronautics Board laid down what it described as a "regulation" allowing all-cargo carriers — but no others — to offer reduced rates for "blocked-space" shipments; it expressly excluded combination airlines such as Petitioners from the benefits of offering the same reduced-rate service.

Acting under this "regulation" the Board issued the order under review, specifically denying applications of Petitioners to offer the same service Slick had been authorized to offer. These actions were taken in response to Slick's request, over the opposition of its fellow all-cargo carrier, Flying Tiger Line, that the Board "delineate the roles" of combination and all-cargo carriers[2] in such

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[1] Federal Aviation Act of 1958, § 401(g), 72 Stat. 756, 49 U.S.C. § 1371(g) (1964); see C.A.B. v. Delta Air Lines, 367 U.S. 316 (1961).

[2] The Board purported to find authority for this delineation in section 416(a) of the Act, 72 Stat. 771, 49 U.S.C. § 1386(a) (1964), which provides:

> The Board may from time to time establish such just and reasonable classifications or groups of air carriers for the purposes of this title as the nature of the services performed by such air carriers shall require; and such just and reasonable rules and regulations, pursuant to and consistent with the provisions of this title, to be observed by each such class or group, as the Board finds necessary in the public interest.

The Board's "Policy Statements," described in the majority's footnote 2, asserted the following justification for its action:

> A logical means of further delineating the role of the all-cargo carriers is *to foster their development* as specialists for

a way as to make the all-cargo carriers the "wholesalers" and the combination carriers the "retailers" of air cargo space. I have trouble seeing how a "regulation" which turns identical certificates into ones which place the licensees in entirely distinct carrier roles, carrying different types of cargo for different types of shippers, can be said to be anything less than an amendment of outstanding certificates. This much is clear, for it is undisputed that after the "regulation" Petitioners could not lawfully engage in the same carriage as their all-cargo competitors. Indeed the Board concedes that its action has excluded Petitioners from performing the kind of carriage which they were originally certificated to perform and in which they have made large investments of capital. I therefore dissent from the majority's conclusion that an adjudicatory hearing was not required. As I see it this is nothing more than a transparent device to favor some carriers at the expense of others.

The certificates of the all-cargo carriers and those of the combination carriers bestow identical rights and impose identical obligations with respect to the carriage of property. It follows that the two types of carriers must be free to file identical tariffs for the carriage of

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large volume air freight service in all-cargo aircraft. The reservation of blocked space arrangements exclusively to the all-cargo carriers is consistent with this objective. The increased concentration of the all-cargo carriers on large volume traffic can be expected to be followed by a shift of small volume shipments to the combination carriers, *whose cargo operations supplement their passenger services* and who are better suited for meeting the needs of this category of traffic and at less cost.

(Emphasis added.) In light of this statement, it should be remembered that the all-cargo airlines carry about 15 per cent of the nation's scheduled domestic airfreight, while the combination carriers carry 85 per cent. Of such freight transported in all-cargo airplanes, the all-cargo lines carry 36 per cent, and the combination lines 64 per cent.

cargo. By permitting the all-cargo carriers to file blocked-space tariffs the Board acknowledges their present authority to file such tariffs under their existing certificates, which, except as to passenger carriage, are the same as those of the combination carriers. By denying the combination carriers the opportunity to file such tariffs the Board in effect amends outstanding certificate authority. *Cf. FCC* v. *National Broadcasting Co. (KOA)*, 319 U.S. 239 (1943).

The majority opinion cites a number of cases in an effort to sustain its holding that the Board has authority to amend Petitioners' certificates by rulemaking rather than an adjudicatory procedure. Those cases are not in point. First, most of them dealt with agencies other than the CAB. The Supreme Court said recently in another context, "federal agencies are not fungibles . . . —Congress has treated the matter with attention to the particular statutory scheme and agency." *UAW* v. *Scofield*, 382 U.S. 205, 210 (1965).[3] We are dealing here with a statute motivated in large part by concern for "security of certificate." *CAB* v. *Delta Air Lines*, 367 U.S. 316, 322 n.6, 324-25 (1961). This concern is reflected in the section 401(g) requirement of an evidentiary hearing before a certificate may even be amended. Second, none of the cases relied on by the majority deals with a situation like that before us, where an agency attempts by rulemaking to amend some—but not all—of the outstanding certificates authorizing a particular kind of service so as to deprive the licensees of a significant part of their license authority.

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[3] This distinction is particularly applicable to Transcontinent Television Corp. v. FCC, 113 U.S.App.D.C. 384, 308 F.2d 339 (1962), cited by the majority, which dealt with the very different legislative situation of broadcast station license renewals under the Communications Act of 1934, which gives the FCC broad powers to make frequencies unavailable by rule amendment.

United States v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956), upon which the majority chiefly relies, as well as *FPC* v. *Texaco*, 377 U.S. 33 (1964),[4] and *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943),[5] are cases dealing with rulemaking applying *across the board* to all *applicants* for licenses or certificates. Petitioners there were not being deprived of any authority they had formerly exercised; in those cases rulemaking was used to formulate reasonable, nondiscriminatory criteria to be met as conditions of receiving certificates in the first place. By contrast, the present appeal involves a use of rulemaking to abridge existing certificates to give favored carriers a monopoly on certain classes of carriage for the express purpose of "foster[ing] their development" at the expense of others not so favored. These differences are not "fortuitous circumstances" recognition of which leads to "revising" or "reshaping" the *Storer* doctrine, as the majority suggests. They are basic not only to the statute but also to the question of the appropriateness of rulemaking procedures, as I will show.

Air Line Pilots Ass'n v. *Quesada*, 276 F.2d 892 (2d Cir. 1960), is even less apposite. That case involved the narrow issue of validity of a rule based on flight safety considerations against pilots flying scheduled aircraft after reaching age 60; there was no amendment of certificate authority in the sense here involved. The licenses originally issued to the pilots specifically provided that their duration was as set out in current regulations. And the Act itself imposes an express duty on the Administrator of the FAA to prescribe reasonable regulations relating to pilot standards. It was thus in a very narrow and limited context that the court held that an adjudicatory hearing was not required for each individual pilot;

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[4] See generally 39 N.Y.U.L. Rev. 347 (1964).

[5] It is relevant to note that the opinion in *National Broadcasting Co.* does not mention the issue before us.

the rule laid down there was made applicable to all pilots, not to certain ones selected by the Board.

Finally, the majority relies on *Capitol Airways* v. *CAB*, 110 U.S.App.D.C. 262, 292 F.2d 755 (1961), which expressly distinguishes cases like the one before us and includes dictum directly on point here, while distinguishing *CAB* v. *American Air Transport, Inc.*, 91 US.App.D.C. 318, 201 F.2d 189 (1952):

> *American Air Transport* . . . involved an effort by the Board to separate the sheep from the goats . . . . This court remanded the case to the District Court to determine whether the Board had in fact changed the terms of existing licenses. The inference to be drawn is that if the Board proposed to discriminate between carriers in the same group, characterizing some as law abiders and some as law breakers, it would be required to afford an evidentiary hearing to those whose operating authority was to be suspended or revoked for cause.
>
> In contrast, in the present case the impact of the Board's decision is on an entire class, rather than on particular members of the class who are singled out as law violators or labeled for some reason as unfit or unworthy. Here, the Board has left all competitors in the field, but has redrawn the rules of the game. Some will be easily able to survive under these new rules; some will not. But there is no attempt to adjudicate the merits of individual firms . . . .

110 U.S.App.D.C. at 265, 292 F.2d at 758. (Footnote omitted.) The majority seeks to distinguish the import of this language and the *American Air Transport* case on the ground that here the Board does not accuse petitioners of violating the law. I confess great difficulty in understanding why licensees not accused of violating the law are not as much entitled to an adjudicatory hearing

as licensees who are so accused, when the two are subjected to equivalent Board action. The majority's proposed distinction seems to me to pose substantial problems of equal protection of the laws under the fifth and fourteenth amendments.

Although it is not necessary to discuss the relative desirability of rulemaking and adjudicatory procedures in a situation where Congress has spoken as clearly as it has here, I note that my conclusion as to congressional meaning is reinforced by a consideration of the types of issues involved here. Rulemaking is normally directed toward the formulation of requirements having a general application to all members of a broadly identifiable class. As pointed out above, however, the CAB's result here is reached by a rule which has different impacts upon members of the same basic category. When the Board makes such a differentiation, the proceedings inescapably become highly adversary in character, especially where the final determination purports to rest upon asserted differences in capabilities and potentialities as between individual carriers. The rulemaking procedure's lack of direct testimony of witnesses, cross-examination, and other features of adjudicatory hearings is totally inadequate for the testing of such competing considerations, both factual and inferential.

While the question whether reduced-rate "blocked-space" service may be offered by *any* carrier might well be appropriate for rulemaking, the selection of particular carriers to provide such service is clearly the sort of question which can be resolved properly and fairly only in an adjudicatory proceeding. Once the Board had decided that it should not allow every freight carrier to offer such service, it was faced with the problem of picking and choosing among competing, mutually exclusive applications. *Cf. Ashbacker Radio Corp.* v. *FCC*, 326 U.S. 327 (1945). Furthermore, these were not applicants compet-

ing for a *new* right which neither had previously held; they were competing to retain a right which their certificates already authorized. The Board's action made some carriers "more equal" than others.

The majority seems to be trying to suggest, by repeated references to the combination carriers as a "class", that any multiple of one automatically makes a class for these purposes; two seems sufficient to make a "class" of the only domestic all-cargo carriers now certificated. The "formal" procedural safeguards which seem to distress the majority, see pp. 10-14 *supra*, were written into law by Congress precisely because Congress believed that they were necessary in making this crucial kind of determination. A general dissatisfaction with the "rigors" of procedural safeguards should not lead to dispensing with them in a case where they are most appropriate, nor to amending the statute judicially.

While it is not essential to my view of this case, it seems to me of no little significance that the history of all transportation, air, water or land, is that the carriage of bulk freight becomes the dominant and most lucrative business. I see no reason why this is not likely to be true in air carriage.[6] Although passenger carriage is clearly a major and profitable market now, it does not follow that it has the bright prospects for expansion that are open to air freight carriage. History indicates that the future will see a steadily increasing ratio of freight tonnage to passenger tonnage. The Board action here arbitrarily permits one group of favored carriers to preempt much of this lucrative and expanding market by depriving

[6] As the majority itself recognizes, the fact that experience since the order became effective shows "no significant diversion" of cargo from petitioners is a makeweight argument lacking in probative value. Moreover, such off-the-record argument is not properly before us.

equally certificated carriers of part of their duly granted authority. The Board's "Policy Statements" confirm the accuracy of this forecast by declaring that the opportunity to offer reduced blocked-space rates would give the all-cargo carriers "a needed source of financial strengthening," while implying that the combination carriers "can be expected" to suffer no reduction in the amount of air freight they presently carry. Even if the Board has the power to realign so drastically the competitive positions of carriers holding equal certificates, the Act as I read it requires that the Board first hold an evidentiary hearing, before it may make such a certificate amendment.

APPENDIX B

Filed March 2, 1966

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1965.

No. 18,833

AMERICAN AIRLINES, INC., *Petitioner,*

v.

CIVIL AERONAUTICS BOARD, *Respondent,*

THE SLICK CORPORATION,
AIR FREIGHT FORWARDERS ASSOCIATION,
THE FLYING TIGER LINE, INC., *Intervenors.*

No. 18,834

TRANS WORLD AIRLINES, INC., *Petitioner,*

v.

CIVIL AERONAUTICS BOARD, *Respondent,*

THE SLICK CORPORATION,
AIR FREIGHT FORWARDERS ASSOCIATION,
THE FLYING TIGER LINE, INC., *Intervenors.*

No. 18,840

UNITED AIR LINES, INC., *Petitioner,*

v.

CIVIL AERONAUTICS BOARD, *Respondent,*

THE SLICK CORPORATION,
AIR FREIGHT FORWARDERS ASSOCIATION,
THE FLYING TIGER LINE, INC., *Intervenors.*

On Petitions to Review an Order of the Civil Aeronautics Board.

Before: BAZELON, Chief Judge, and FAHY, WASHINGTON*, DANAHER, BURGER, WRIGHT, MCGOWAN, TAMM and LEVENTHAL, Circuit Judges, sitting *en banc*.

Judgment

These cases came on to be reheard before the court *en banc* on the record from the Civil Aeronautics Board, and were reargued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this court *en banc* that the order of the Civil Aeronautics Board on review in these cases is affirmed.

Per Circuit Judge LEVENTHAL

Dated: March 2, 1966

Senior Circuit Judge Washington did not participate in the decision of these cases.

Separate dissenting opinion by Circuit Judge Burger, with whom Circuit Judges Danaher and Tamm join.

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* Circuit Judge Washington became Senior Circuit Judge on November 10, 1965.

APPENDIX C

Order No. E-21170

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.,
on the 11th day of August, 1964

Docket 15419

Blocked-space air freight tariffs of

AMERICAN AIRLINES, INC.
TRANS WORLD AIRLINES, INC.
UNITED AIR LINES, INC.

Order

The Board, by Order E-21076, of July 17, 1964, suspended and instituted an investigation of the proposed block space tariffs of The Slick Corporation and Trans World Airlines, Inc. Subsequently, by Orders E-21122 dated July 27, 1964 and E-21167 dated August 10, 1964, the Board took similar action with respect to the same type of tariffs filed by American Airlines, Inc., and United Air Lines, Inc., respectively.[1] On August 7, 1964, the Board adopted a Statement of General Policy, Amendment No. 3 to Part 399 of the Board's Regulations. In that regulation we determined that on the basis of policy considerations therein before us, the combination passenger-cargo carriers should not be permitted to offer blocked space service. American, TWA and United are combination carriers as contemplated in this regulation and without authority to provide blocked space service. It follows, in view of this

[1] Order E-21160 dated August 7, 1964 vacating the suspension of the Slick tariff was stayed to and including August 17, 1964, by Order E-21166 dated August 7, 1964.

determination, that the tariffs of American, TWA, and United are inconsistent with the regulations of the Board as well as with the provisions of section 403 of the Federal Aviation Act of 1958. Consequently we will herein reject the block space tariffs of American, TWA, and United as unauthorized by section 403 of the Act and the provisions of the Board's regulations.

The rejection herein of the blocked spaced tariffs of American, TWA, and United removes as an issue in this proceeding the lawfulness of such tariff proposals and we will accordingly dismiss the investigation previously ordered in this docket as to the blocked space tariffs of these carriers.[2] However, for the reasons heretofore stated in Order E-21076 of July 17, 1964, the investigation of the lawfulness of the Slick blocked space tariff proposal is necessary, and the processing of that matter will continue unaffected by any action taken herein.

Accordingly, pursuant to the Federal Aviation Act of 1958, and particularly sections 102, 204(a), and 403, thereof,

IT IS ORDERED THAT:

1. The following tariffs and revised pages are hereby rejected:

(a) American Airlines, Inc. Tariff C.A.B. No. 166;

(b) Trans World Airlines, Inc. Tariff C.A.B. No. 125;

(c) Agent J. Aniello's Tariff C.A.B. No. 28;

(d) 10th and 11th Revised Pages 18 of Agent J. Aniello's Tariff C.A.B. No. 13.

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[2] Under our statement of general policy of August 7, 1964, blocked space services may be provided by all-cargo carriers and the blocked space tariff filed by Slick, an all-cargo carrier is properly fileable under section 403 of the act and the Board's regulations.

2. The investigation instituted by ordering paragraphs 1 of Orders E-21076, E-21122, and E-21167, insofar as they are applicable to blocked spaced tariffs of American Airlines, Inc., Trans World Airlines, Inc., and United Air Lines, Inc., is dismissed.

3. Copies of this order shall be filed with the tariffs and served upon all parties to this proceeding.

4. This order shall be effective August 11, 1964.

This order will be published in the Federal Register.

By the Civil Aeronautics Board:

HAROLD R. SANDERSON
Secretary

(SEAL)

GURNEY and GILLILLAND, Members, Dissenting:

We cannot agree for the reasons stated in the dissent attached to Order E-21160, August 7, 1964 that the blocked-space tariffs filed by the combination carriers be rejected. All of the blocked-space tariffs should be suspended and investigated to determine their lawfulness.

Furthermore, for the reasons stated in the dissent attached to Part 399, Amendment 3, August 7, 1964, we cannot agree that the Board can legally preclude the combination carriers from offering competitive blocked-space service.

/s/ CHAN GURNEY
/s/ WHITNEY GILLILLAND

APPENDIX D

A. The Following Provisions of the Federal Aviation Act of 1958, 72 Stat. 731, as Amended, 49 U.S.C. § 1301 et seq., Are Principally Involved:

Sec. 101 [72 Stat. 737, *as amended*, 49 U.S.C. § 1301].

DEFINITIONS

As used in this chapter, unless the context otherwise requires—

* * *

(3) "Air carrier" means any citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in air transportation: *Provided*, That the Board may by order relieve air carriers who are not directly engaged in the operation of aircraft in air transportation from the provisions of this chapter to the extent and for such periods as may be in the public interest.

* * *

(10) "Air transportation" means interstate, overseas, or foreign air transportation or the transportation of mail by aircraft.

* * *

(21) "Interstate air transportation", "overseas air transportation", and "foreign air transportation", respectively, mean the carriage by aircraft of persons or property as a common carrier for compensation or hire or the carriage of mail by aircraft, in commerce between, respectively—

(a) a place in any State of the United States, or the District of Columbia, and a place in any other State of the United States, or the District of Columbia; or between places in the same State of the United States through the airspace over any place outside thereof;

or between places in the same Territory or possession of the United States, or the District of Columbia;

(b) a place in any State of the United States, or the District of Columbia, and any place in a Territory or possession of the United States; or between a place in a Territory or possession of the United States, and a place in any other Territory or possession of the United States; and

(c) a place in the United States and any place outside thereof;

whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation.

Sec. 102 [72 Stat. 740, 49 U.S.C. § 1302].

CONSIDERATION OF MATTERS IN PUBLIC INTEREST BY BOARD

In the exercise and performance of its powers and duties under this chapter, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity:

(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(e) The promotion of safety in air commerce; and

(f) The promotion, encouragement, and development of civil aeronautics.

* * *

Sec. 204 [72 Stat. 743, 49 U.S.C. § 1324].

GENERAL POWERS AND DUTIES OF THE BOARD

(a) Performance of acts; conduct of investigations; orders, rules, regulations, and procedure.

The Board is empowered to perform such acts, to conduct such investigations, to issue and amend such orders, and to make and amend such general or special rules, regulations, and procedure, pursuant to and consistent with the provisions of this chapter, as it shall deem necessary to carry out the provisions of, and to exercise and perform its powers and duties under, this chapter.

* * *

Sec. 401 [72 Stat. 754, *as amended,* 49 U.S.C. § 1371].

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY.

(a) Essentiality.

No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board

authorizing such air carrier to engage in such transportation.

* * *

(c) Notice of application; filing of protest or memorandum; hearing.

Upon the filing of any such application, the Board shall give due notice thereof to the public by posting a notice of such application in the office of the secretary of the Board and to such other persons as the Board may by regulation determine. Any interested person may file with the Board a protest or memorandum of opposition to or in support of the issuance of a certificate. Such application shall be set for public hearing; and the Board shall dispose of such application as speedily as possible.

(d) Issuance.

(1) The Board shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly, and to conform to the provisions of this chapter and the rules, regulations, and requirements of the Board hereunder, and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied.

(2) In the case of an application for a certificate to engage in temporary air transportation, the Board may issue a certificate authorizing the whole or any part thereof for such limited periods as may be required by the public convenience and necessity, if it finds that the applicant is fit, willing, and able properly to perform such transportation and to conform to the provisions of this chapter and the rules, regulations, and requirements of the Board hereunder.

* * *

(e) Terms, conditions, and limitations.

(1) Each certificate issued under this section shall specify the terminal points and intermediate points, if any, between which the air carrier is authorized to engage in air transportation and the service to be rendered; and there shall be attached to the exercise of the privileges granted by the certificate, or amendment thereto, such reasonable terms, conditions, and limitations as the public interest may require.

* * *

(4) No term, condition, or limitation of a certificate shall restrict the right of an air carrier to add to or change schedules, equipment, accommodations, and facilities for performing the authorized transportation and service as the development of the business and the demands of the public shall require; except that the Board may impose such terms, conditions, or limitations in a certificate for supplemental air transportation when required by subsection (d)(3) of this section.

* * *

(6) Any air carrier, other than a supplemental air carrier, may perform charter trips or any other special service, without regard to the points named in its certificate, or the type of service provided therein, under regulations prescribed by the Board.

(f) Effective date and duration.

Each certificate shall be effective from the date specified therein, and shall continue in effect until suspended or revoked as hereinafter provided, or until the Board shall certify that operation thereunder has ceased, or, if issued for a limited period of time under subsection (d)(2) of this section shall continue in effect until the expiration thereof, unless, prior to the date of expiration such certificate shall be suspended or revoked as provided herein, or the Board shall certify that operations thereunder have ceased:

Provided, That if any service authorized by a certificate is not inaugurated within such period, not less than ninety days, after the date of the authorization as shall be fixed by the Board, or if, for a period of ninety days or such other period as may be designated by the Board any such service is not operated, the Board may by order, entered after notice and hearing, direct that such certificate shall thereupon cease to be effective to the extent of such service.

(g) Alteration, amendment, modification, suspension, or revocation.

The Board upon petition or complaint or upon its own initiative, after notice and hearings, may alter, amend, modify, or suspend any such certificate, in whole or in part, if the public convenience and necessity so require, or may revoke any such certificate, in whole or in part, for intentional failure to comply with any provision of this sub-chapter or any order, rule, or regulation issued hereunder or any term, condition, or limitation of such certificate: *Provided*, That no such certificate shall be revoked unless the holder thereof fails to comply, within a reasonable time to be fixed by the Board, with an order of the Board commanding obedience to the provision, or to the order (other than an order issued in accordance with this proviso), rule, regulation, term, condition, or limitation found by the Board to have been violated. Any interested person may file with the Board a protest or memorandum in support of or in opposition to the alteration, amendment, modification, suspension, or revocation of the certificate.

* * *

Sec. 403 [72 Stat. 758, *as amended*, 49 U.S.C. § 1373].

TARIFFS OF AIR CARRIERS

(a) Filing, posting, and publication; rejection of tariffs.

Every air carrier and every foreign air carrier shall file with the Board, and print, and keep open to public in-

spection, tariffs showing all rates, fares, and charges for air transportation between points served by it, and points served by any other air carrier or foreign air carrier when through service and through rates shall have been established, and showing to the extent required by regulations of the Board, all classifications, rules, regulations, practices and services in connection with such air transportation. Tariffs shall be filed, posted, and published in such form and manner, and shall contain such information, as the Board shall by regulation prescribe; and the Board is empowered to reject any tariff so filed which is not consistent with this section and such regulations. Any tariff so rejected shall be void. The rates, fares, and charges shown in any tariff shall be stated in terms of lawful money of the United States, but such tariffs may also state rates, fares, and charges in terms of currencies other than lawful money of the United States, and may, in the case of foreign air transportation, contain such information as may be required under the laws of any country in or to which an air carrier or foreign air carrier is authorized to operate.

(b) Observance of tariffs; granting of rebates.

No air carrier or foreign air carrier shall charge or demand or collect or receive a greater or less or different compensation for air transportation, or for any service in connection therewith, than the rates, fares, and charges specified in its currently effective tariffs; and no air carrier or foreign air carrier shall, in any manner or by any device, directly or indirectly, or through any agent or broker, or otherwise, refund or remit any portion of the rates, fares, or charges so specified, or extend to any person any privileges or facilities, with respect to matters required by the Board to be specified in such tariffs, except those specified therein. Nothing in this chapter shall prohibit such air carriers or foreign air carriers, under such terms and conditions as the Board may prescribe,

from issuing or interchanging tickets or passes for free or reduced-rate transportation to their directors, officers, and employees (including retired directors, officers, and employees who are receiving retirement benefits from any air carrier or foreign air carrier), the parents and immediate families of such officers and employees, and the immediate families of such directors; widows, widowers, and minor children of employees who have died as a direct result of personal injury sustained while in the performance of duty in the service of such air carrier or foreign air carrier; witnesses and attorneys attending any legal investigation in which any such air carrier is interested; persons injured in aircraft accidents and physicians and nurses attending such persons; immediate families, including parents, of persons injured or killed in aircraft accidents where the object is to transport such persons in connection with such accident; and any person or property with the object of providing relief in cases of general epidemic, pestilence, or other calamitous visitation; and, in the case of overseas or foreign air transportation, to such other persons and under such other circumstances as the Board may by regulations prescribe. Any air carrier or foreign air carrier, under such terms and conditions as the Board may prescribe, may grant reduced-rate transportation to ministers of religion on a space-available basis.

(c) Notice of change in tariff.

No change shall be made in any rate, fare, or charge, or any classification, rule, regulation, or practice affecting such rate, fare, or charge, or the value of the service thereunder, specified in any effective tariff of any air carrier or foreign air carrier, except after thirty days' notice of the proposed change filed, posted, and published in accordance with subsection (a) of this section. Such notice shall plainly state the change proposed to be made and the time such change will take effect. The Board may in the public interest, by

regulation or otherwise, allow such change upon notice less than that herein specified, or modify the requirements of this section with respect to filing and posting of tariffs, either in particular instances or by general order applicable to special or peculiar circumstances or conditions.

(d) Filing of divisions of rates and charges.

Every air carrier or foreign air carrier shall keep currently on file with the Board, if the Board so requires, the established divisions of all joint rates, fares, and charges for air transportation in which such air carrier or foreign air carrier participates.

Sec. 404 [72 Stat. 760, 49 U.S.C. § 1374].

RATES FOR CARRIAGE OF PERSONS AND PROPERTY; DUTY TO PROVIDE SERVICE, RATES, AND DIVISIONS; DISCRIMINATION.

(a) It shall be the duty of every air carrier to provide and furnish interstate and overseas air transportation, as authorized by its certificate, upon reasonable request therefor and to provide reasonable through service in such air transportation in connection with other air carriers; to provide safe and adequate service, equipment, and facilities in connection with such transportation; to establish, observe, and enforce just and reasonable individual and joint rates, fares, and charges, and just and reasonable classifications, rules, regulations, and practices relating to such air transportation; and, in case of such joint rates, fares, and charges, to establish just, reasonable, and equitable divisions thereof as between air carriers participating therein which shall not unduly prefer or prejudice any of such participating air carriers.

(b) No air carrier or foreign air carrier shall make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, locality, or description of traffic in air transportation in any respect whatsoever or subject any particular person, port, locality,

or description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

* * *

Sec. 412 [72 Stat. 770, 49 U.S.C. § 1382].

POOLING AND OTHER AGREEMENTS; FILING; APPROVAL BY BOARD.

(a) Every air carrier shall file with the Board a true copy, or, if oral, a true and complete memorandum, of every contract or agreement (whether enforceable by provisions for liquidated damages, penalties, bonds, or otherwise) affecting air transportation and in force on the effective date of this section or hereafter entered into, or any modification or cancellation thereof, between such air carrier and any other air carrier, foreign air carrier, or other carrier for pooling or apportioning earnings, losses, traffic, service, or equipment, or relating to the establishment of transportation rates, fares, charges, or classifications, or for preserving and improving safety, economy and efficiency of operation, or for controlling, regulating, preventing, or otherwise eliminating destructive, oppressive, or wasteful competition, or for regulating stops, schedules, and character of service, or for other cooperative working arrangements.

(b) The Board shall by order disapprove any such contract or agreement, whether or not previously approved by it, that it finds to be adverse to the public interest, or in violation of this chapter, and shall by order approve any such contract or agreement, or any modification or cancellation thereof, that it does not find to be adverse to the public interest, or in violation of this chapter; except that the Board may not approve any contract or agreement between an air carrier not directly engaged in the operation of aircraft in air transportation and a common carrier subject to the Interstate Commerce Act, as amended, governing

the compensation to be received by such common carrier for transportation services performed by it.

* * *

Sec. 416 [72 Stat. 771, 49 U.S.C. § 1386].

CLASSIFICATION AND EXEMPTION OF CARRIERS.

(a) The Board may from time to time establish such just and reasonable classifications or groups of air carriers for the purposes of this subchapter as the nature of the services performed by such air carriers shall require; and such just and reasonable rules and regulations, pursuant to and consistent with the provisions of this subchapter, to be observed by each such class or group, as the Board finds necessary in the public interest.

(b)(1) The Board, from time to time and to the extent necessary, may (except as provided in paragraph (2) of this subsection) exempt from the requirements of this subchapter or any provision thereof, or any rule, regulation, term, condition, or limitation prescribed thereunder, any air carrier or class of air carriers, if it finds that the enforcement of this subchapter or such provision, or such rule, regulation, term, condition, or limitation is or would be an undue burden on such air carrier or class of air carriers by reason of the limited extent of, or unusual circumstances affecting, the operations of such air carrier or class of air carriers and is not in the public interest.

* * *

Sec. 1002 [72 Stat. 788, 49 U.S.C. § 1482].

COMPLAINTS TO AND INVESTIGATIONS BY THE ADMINISTRATOR AND THE BOARD.

* * *

(c) Entry of orders for compliance with chapter.

If the Administrator or the Board finds, after notice and hearing, in any investigation instituted upon com-

plaint or upon their own initiative, with respect to matters within their jurisdiction, that any person has failed to comply with any provision of this chapter or any requirement established pursuant thereto, the Administrator or the Board shall issue an appropriate order to compel such person to comply therewith.

(d) Power to prescribe rates and practices of air carriers.

Whenever, after notice and hearing, upon complaint, or upon its own initiative, the Board shall be of the opinion that any individual or joint rate, fare, or charge demanded, charged, collected or received by any air carrier for interstate or overseas air transportation, or any classification, rule, regulation, or practice affecting such rate, fare, or charge, or the value of the service thereunder, is or will be unjust or unreasonable, or unjustly discriminatory, or unduly preferential, or unduly prejudicial, the Board shall determine and prescribe the lawful rate, fare, or charge (or the maximum or minimum, or the maximum and minimum thereof) thereafter to be demanded, charged, collected, or received, or the lawful classification, rule, regulation, or practice thereafter to be made effective: *Provided*, That as to rates, fares, and charges for overseas air transportation, the Board shall determine and prescribe only a just and reasonable maximum or minimum, or maximum and minimum rate, fare, or charge.

(e) Rule of rate making.

In exercising and performing its powers and duties with respect to the determination of rates for the carriage of persons or property, the Board shall take into consideration, among other factors—

(1) The effect of such rates upon the movement of traffic;

(2) The need in the public interest of adequate and efficient transportation of persons and property by air

carriers at the lowest cost consistent with the furnishing of such service;

(3) Such standards respecting the character and quality of service to be rendered by air carriers as may be prescribed by or pursuant to law;

(4) The inherent advantages of transportation by aircraft; and

(5) The need of each air carrier for revenue sufficient to enable such air carrier, under honest, economical, and efficient management, to provide adequate and efficient air carrier service.

* * *

(g) Suspension of rates.

Whenever any air carrier shall file with the Board a tariff stating a new individual or joint (between air carriers) rate, fare, or charge for interstate or overseas air transportation or any classification, rule, regulation, or practice affecting such rate, fare, or charge, or the value of the service thereunder, the Board is empowered, upon complaint or upon its own initiative, at once, and, if it so orders, without answer or other formal pleading by the air carrier, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, or charge, or such classification, rule, regulation, or practice; and pending such hearing and the decision thereon, the Board, by filing with such tariff, and delivering to the air carrier affected thereby, a statement in writing of its reasons for such suspension, may suspend the operation of such tariff and defer the use of such rate, fare, or charge, or such classification, rule, regulation, or practice, for a period of ninety days, and, if the proceeding has not been concluded and a final order made within such period, the Board may, from time to time, extend the period of suspension, but not for a longer period in the aggregate than one hundred and eighty days beyond the time when such tariff would otherwise go into effect;

and, after hearing, whether completed before or after the rate, fare, charge, classification, rule, regulation, or practice goes into effect, the Board may make such order with reference thereto as would be proper in a proceeding instituted after such rate, fare, charge, classification, rule, regulation, or practice had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed rate, fare, charge, classification, rule, regulation, or practice shall go into effect at the end of such period: *Provided*, That this subsection shall not apply to any initial tariff filed by any air carrier.

* * *

B. The Following Provisions of the Administrative Procedure Act, 60 Stat. 237 (1946), as Amended, 5 U.S.C. § 1001 et seq., Are Principally Involved:

Sec. 2 [60 Stat. 237, *as amended*, 5 U.S.C. § 1001].

DEFINITIONS

As used in this chapter—

* * *

(c) Rule and rule making.

"Rule" means the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing upon any of the foregoing. "Rule making" means agency process for the formulation, amendment, or repeal of a rule.

(d) Order and adjudication.

"Order" means the whole or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of any agency in any matter other than rule making but including licensing. "Adjudication" means agency process for the formulation of an order.

(e) License and licensing.

"License" includes the whole or part of any agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission. "Licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license.

* * *

Sec. 4 [60 Stat. 238, 5 U.S.C. § 1003].

RULE MAKING

Except to the extent that there is involved (1) any military, naval, or foreign affairs function of the United States or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts—

(a) Notice; publication and contents.

General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall

not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(b) Procedures.

After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose. Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of sections 1006 and 1007 of this title shall apply in place of the provisions of this subsection.

(c) Time of publication or service of rules.

The required publication or service of any substantive rule (other than one granting or recognizing exemption or relieving restriction or interpretative rules and statements of policy) shall be made not less than thirty days prior to the effective date thereof except as otherwise provided by the agency upon good cause found and published with the rule.

(d) Petitions.

Every agency shall accord any interested person the right to petition for the issuance, amendment, or repeal of a rule.

C. The Board's Statement of General Policy on Blocked Space Service, 14 C.F.R. § 399.37, Reads as Follows:

§ 399.37 *Blocked Space Service.*

(a) As used in this statement:

(1) "All-cargo carrier" means an air carrier holding a certificate of public convenience and necessity issued pursuant to Section 401(d)(1) or (2) of the Federal Aviation Act of 1958 which authorizes the carriage of property only or of property and mail only.

(2) "Blocked space service" means the carriage of property in all-cargo aircraft at wholesale rates pursuant to an effective tariff stating a rate applicable only when the user reserves and agrees to pay for a specified amount of space or lift on a regular recurring basis for a period not less than 60 days.

(3) "Combination carrier" means an air carrier holding a certificate of public convenience and necessity issued pursuant to Section 401(d)(1) and (2) of the Act which authorizes the carriage of persons, property and mail or persons and property only.

(b) It is the policy of the Board to permit all-cargo carriers to provide blocked space service to (1) such combination carriers as may choose to use it to provide service over routes which are certificated to both the combination and the all-cargo carrier involved; (2) air freight forwarders; and (3) large volume individual shippers.

(c) It is the policy of the Board not to permit combination carriers to provide blocked space service.

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Supreme Court of the United States

OCTOBER TERM, 1966

AMERICAN AIRLINES, INC., TRANS WORLD AIRLINES, INC., UNITED AIR LINES, INC.,
Petitioners,

v.

CIVIL AERONAUTICS BOARD, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR CERTAIN AIR CARRIERS AS AMICI CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

R. S. MAURER
ROBERT REED GRAY
Attorneys for Delta Air Lines, Inc.
1001 Connecticut Ave., N.W.
Washington, D. C. 20036

B. HOWELL HILL
Attorney for Braniff Airways, Inc.
1229 - 19th Street, N.W.
Washington, D. C. 20036

HERMAN F. SCHEURER, JR.
C. EDWARD LEASURE
Attorneys for Continental Air Lines, Inc.
1701 K Street, N. W.
Washington, D. C. 20006

GEORGE C. NEAL
Attorney for Eastern Air Lines, Inc.
1001 Connecticut Ave., N.W.
Washington, D. C. 20036

ANDREW T. A. MACDONALD
Attorney for National Airlines, Inc.
729 - 15th Street, N. W.
Washington, D. C. 20005

HENRY E. FOLEY
CLARENCE I. PETERSON
Attorneys for Northeast Airlines, Inc.
1626 Eye Street, N. W.
Washington, D. C. 20006

EMORY T. NUNNELEY
ROBERT N. DUGGAN
Attorneys for Northwest Airlines, Inc.
1200 - 18th Street, N. W.
Washington, D. C. 20036

RAMON DE MURIAS
Attorney for Pan American-Grace Airways, Inc.
135 East 42nd Street,
New York, N. Y. 10017

HUBERT A. SCHNEIDER
Attorney for Pan American World Airways, Inc.
200 Park Avenue,
New York, N. Y. 10017

DOMINIC P. RENDA
Attorney for Western Air Lines, Inc.
6060 Avion Drive
Los Angeles, California 90009

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Amici are trunkline air carriers permanently certificated by the Civil Aeronautics Board to transport persons, property and mail by air. They are "combination carriers" within the meaning of the Board's blocked space policy statement.* (R. 144, J.A. 80.) By virtue of that policy statement and the Board's implementation of it, as illustrated in the present case, these carriers are or may be prohibited from filing tariffs providing for blocked space service.

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* Regulation No. PS-24, 14 C.F.R. § 399.37.

Simply stated, "blocked space service" means the transportation of property in all-cargo aircraft at wholesale rates applicable only when the shipper reserves a specified amount of space on a regularly recurring basis for a given period of time. (R. 144, J.A. 80.) Under the Board's policy statement only all-cargo carriers, holders of certificates that authorize the transportation only of property or of property and mail, may provide blocked space service.

The *amici* have made very substantial investments, both in aircraft and ground facilities, in the air freight business. They are threatened with grave injury by the Board's adoption and implementation of its blocked space policy. If an all-cargo carrier sees fit to file blocked space tariffs applicable on a route served by any of them, the affected combination carrier will be powerless to match the lower rates of its competitor and may well see its bulk freight business slip away. One of the *amici* has attempted to file a tariff to match an all-cargo competitor's blocked space tariff and has seen it rejected, like petitioners' tariffs, on the basis of the Board's policy statement.

All of the *amici* participated in the rulemaking proceeding as a result of which the Board adopted its policy statement on blocked space service. They were given no notice by the Board in that proceeding that it was contemplating making blocked space service the exclusive preserve of the all-cargo carriers. Three of the *amici** also appeared as *amici curiae* in the court below and filed a brief in support of petitioners. The carriers participating as *amici* there emphasized that the Board never gave them notice that it contemplated establishing a blocked space monopoly in the all-cargo carriers.

---

* Delta Air Lines, Inc., Braniff Airways, Inc., and Continental Air Lines, Inc.

ARGUMENT

1. The decision of the court below upholding the Board's implementation of its blocked space policy statement through the rejection of petitioners' blocked space tariffs is in flat conflict with prior decisions of this Court. By the Board's own statement in its order of rejection, petitioners' tariffs were rejected because petitioners were "without authority to provide blocked space service." (R. 159, J. A. 95.) Yet the Board acknowledged by its previous acceptance and suspension of those tariffs that petitioners were authorized under the terms of their certificates to offer blocked space service. (R. 122-28, 129-31, 156-58, J.A. 58-64, 65-67, 92-94.) Thus only the policy statement itself made the word "property" in petitioners' certificates mean something different from the same word in the certificate of The Slick Corporation, whose blocked space tariff was accepted by the Board.

This modification of petitioners' certificates without the mandatory notice and hearing required by sections 401(f) and (g) of the Federal Aviation Act, 49 U.S.C. §§ 1371(f), (g), can be sustained only by disregarding this Court's decisions in *CAB* v. *Delta Air Lines*, 367 U.S. 316 (1961); *United States* v. *Seatrain Lines*, 329 U.S. 424 (1947); and *FCC* v. *National Broadcasting Co.* (KOA), 319 U.S. 239 (1943).

Amici have suffered the same modification of their certificates as have petitioners. One of them indeed has had a tariff filing rejected for lack of authority to provide blocked space service.

Of primary concern to *amici* is the failure of the Board and the court below to pay any heed to the security of their certificates, which this Court so emphasized in the *Delta* case. The large and growing investment of these carriers in aircraft and ground facilities and all that goes with operating trunk airlines is based upon the

certificates they hold naming their routes and specifying the services they may render. The integrity of this investment is directly related to the security of those certificates. If through rulemaking the Board is permitted to cut away portions of *amici's* authority under their certificates, there will no longer be the kind of security of license rights in airline routes that Congress, as the Court held in the *Delta* case, meant that there should be. Under the guise of classification, *amici* might be told tomorrow that they could no longer serve cities less than 500 miles apart—that such short-haul service had been reserved for a different class of carriers. That *amici* had made large investments in short-haul operations would be of no avail. The Board would be able to do indirectly what under the *Delta* case it cannot do directly without the notice and evidentiary hearing required by Section 401(g) of the Act. Compare Ryan, *The Revocation of an Airline Certificate of Public Convenience and Necessity*, 15 J. Air L. & Com. 377, 384 (1948).

2. Like the petitioners, one of the *amici* (Continental Air Lines) has suffered summary rejection of a blocked space tariff, filed to match an all-cargo carrier competitor's tariff, CAB Order No. E-23127, Jan. 18, 1966, and the other *amici* face the same prospect. The Board's action—taken without an evidentiary hearing—thus prohibited that amicus from meeting the reduced rates of its competitor. Such action is in the teeth of principles laid down or approved by this Court. See *Texas & Pac. Ry.* v. *United States*, 289 U.S. 627, 636 (1933); *New York Central R.R.* v. *United States*, 99 F. Supp. 394, 398 (D. Mass. 1951), *aff'd per curiam*, 342 U.S. 890 (1951); *cf. ICC* v. *New York, N.H. & H. R.R.*, 372 U.S. 744 (1963).

3. The way in which the blocked space policy statement was promulgated presents a question that should be decided by this Court concerning the procedures agencies should follow in making rules that affect vital in-

terests. The Board failed to comply with the fundamental requirements of Section 4 of the Administrative Procedure Act, 5 U.S.C. § 1003, as to notice and the opportunity for written comment. *Amici* recognize that, had the Board's blocked space "policy statement" been what it purported to be, it would have been exempt from the requirements of Section 4 of the Administrative Procedure Act as a "general statement of policy." However, the Board transformed its so-called "policy statement" into a substantive rule when it rejected petitioners' blocked space tariffs solely on the basis of the policy statement. (R. 159, J.A. 95.) The "policy statement" then, if still an appropriate subject for rule-making at all, clearly could not be validly promulgated without strict compliance with Section 4.

The Board argued in the court below that the combination carriers had actual notice that the Board was considering reserving the privilege of providing blocked space service exclusively for the all-cargo carriers. As a matter of fact, the Board never gave any such notice, actual or otherwise. As noted heretofore, three of the present *amici* informed the court below in their brief of the fact that the Board never gave notice that it contemplated making blocked space service a monopoly of the all-cargo carriers. The *amici* as well as the petitioners deserve to be heard on that question.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the petition for certiorari herein be granted. This case presents important questions of administrative law, as well as important questions in the administration of the Federal Aviation Act, affecting the vital economic interests of a very large segment of the airline industry.

Respectfully submitted,

R. S. MAURER
ROBERT REED GRAY
Attorneys for Delta Air Lines, Inc.
1001 Connecticut Ave., N.W.
Washington, D. C. 20036

B. HOWELL HILL
Attorney for Braniff Airways, Inc.
1229 - 19th Street, N.W.
Washington, D. C. 20036

HERMAN F. SCHEURER, JR.
C. EDWARD LEASURE
Attorneys for Continental Air Lines, Inc.
1701 K Street, N. W.
Washington, D. C. 20006

GEORGE C. NEAL
Attorney for Eastern Air Lines, Inc.
1001 Connecticut Ave., N.W.
Washington, D. C. 20036

ANDREW T. A. MACDONALD
Attorney for National Airlines, Inc.
729 - 15th Street, N. W.
Washington, D. C. 20005

HENRY E. FOLEY
CLARENCE I. PETERSON
Attorneys for Northeast Airlines, Inc.
1626 Eye Street, N. W.
Washington, D. C. 20006

EMORY T. NUNNELEY
ROBERT N. DUGGAN
Attorneys for Northwest Airlines, Inc.
1200 - 18th Street, N. W.
Washington, D. C. 20036

RAMON DE MURIAS
Attorney for Pan American-Grace Airways, Inc.
135 East 42nd Street,
New York, N. Y. 10017

HUBERT A. SCHNEIDER
Attorney for Pan American World Airways, Inc.
200 Park Avenue,
New York, N. Y. 10017

DOMINIC P. RENDA
Attorney for Western Air Lines, Inc.
6060 Avion Drive
Los Angeles, California 90009

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 304

AMERICAN AIRLINES, INC., ET AL., PETITIONERS

v.

CIVIL AERONAUTICS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE CIVIL AERONAUTICS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, 13a–39a) is reported at 359 F. 2d 624. The order of the Civil Aeronautics Board (Pet. App. C, 42a–44a) is not yet reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. B, 40a–41a) was entered on March 2, 1966. On May 14, 1966, Mr. Chief Justice Warren extended the time for filing a petition for a writ of certiorari to and including June 30, 1966. The petition was filed on that day. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Civil Aeronautics Board, in promulgating a rule authorizing all-cargo carriers alone to offer "blocked space" cargo service, exceeded its rule-making authority.

STATUTES INVOLVED

The pertinent provisions of the Federal Aviation Act of 1958, 72 Stat. 731, 49 U.S.C. 1301, *et seq.*, and of the Administrative Procedure Act, 60 Stat. 237, 5 U.S.C. 1001, *et seq.*, are set forth in Appendix D to the petition for certiorari.

STATEMENT

Following a rule-making proceeding, the Civil Aeronautics Board adopted a regulation authorizing all-cargo carriers, but not combination (passengers plus cargo) carriers, to offer "blocked space" air cargo service. The regulation permits a shipper to contract at wholesale rates for a specified amount of cargo capacity (which must be paid for whether or not actually used) aboard a particular carrier's all-cargo aircraft on a regularly recurring schedule for a period of 60 days or more. Pursuant to this regulation, the Board rejected tariffs for "blocked space" service filed by petitioners—the three largest combination carriers—while permitting a similar tariff filed by the Slick Corporation, an all-cargo carrier, to go into effect pending an investigation by the Board of the legality of the rates proposed in Slick's tariff. The background of the regulation is as follows.

The distinction between combination and all-cargo carriers has been recognized for regulatory purposes,

ever since the Board certified a group of all-cargo carriers to serve as specialists in this field some twenty years ago.[1] In November 1962, the Board instituted a rule-making proceeding to consider, among other questions, what volume and types of charter flights each class of carrier should be authorized to furnish. In January 1964, the Board published a supplemental notice of rule-making (J.A. 115), which proposed a regulation "to delineate the roles of the all-cargo and supplemental carriers and to establish a policy favoring the purchase from all-cargo carriers of blocked space at wholesale rates by the combination carriers."

Numerous comments were submitted in response to this notice (J.A. 129–35). However, before the Board took any further action in this proceeding, Slick[2] filed a tariff for blocked-space service between New York and Los Angeles and New York and San Francisco, under which substantial rate reductions would be allowed shippers who contracted for a specified amount of space on specified flights every week for 90 days or more. Petitioners filed complaints challenging the legality of Slick's tariff on various grounds, and asking the Board to suspend and in-

[1] *Air Freight Case*, 10 C.A.B. 572, affirmed *sub nom. American Airlines* v. *Civil Aeronautics Board*, 192 F. 2d 417 (C.A.D.C. 1951). The history of the all-cargo industry is traced in *Domestic Cargo-Mail Service Case*, 36 C.A.B. 344, 352–355.

[2] Slick suspended its scheduled operations on September 1, 1965 (C.A.B. Order Nos. E–22588, August 27, 1965; E–23352, March 14, 1966). Airlift International, Inc., has applied for the transfer of Slick's certificate to it. At the present time there is only one all-cargo carrier, The Flying Tiger Line, that can offer blocked-space service on the New York-Los Angeles and New York-San Francisco routes Slick formerly served.

vestigate it. They also filed assertedly "defensive" blocked-space tariffs of their own, duplicating Slick's in most respects. Slick, in turn, asked the Board either to reject these tariffs or to suspend and investigate them.

While these tariff proceedings were pending, the Board issued a further supplemental notice of proposed rule-making (J.A. 137), inviting oral argument on whether all-cargo carriers should be "permitted to sell blocked space at wholesale rates to air freight forwarders and other large volume shippers." The all-cargo carriers proposed that they alone should be authorized to offer blocked-space service; petitioners and other combination carriers vigorously opposed (J.A. 149–171).

On August 7, 1964, the Board issued its Regulation No. PS–24 (J.A. 74–80; 14 C.F.R. § 339.37), announcing a policy of permitting all-cargo carriers, but not combination carriers, to provide blocked-space service to combination carriers, air freight forwarders, and large-volume individual shippers.[3] In an accompanying statement of the basis and purpose of the rule, the Board observed that differences in the service and function of combination and all-cargo carriers were inherent in the terms of their certificates and their operating responsibilities thereunder. A

[3] Blocked-space service was defined as

> the carriage of property *in all-cargo aircraft* at wholesale rates pursuant to an effective tariff stating a rate applicable only when the user reserves and agrees to pay for a specified amount of space or lift on a regularly recurring basis for a period of not less than 60 days. [Emphasis added.]

logical and practical means for further delineating the role of all-cargo carriers, the Board reasoned, was to encourage their development as specialists for large-volume air freight service in all-cargo aircraft. However, while blocked-space service had a substantial potential for attracting to air freight substantial volumes of bulk traffic now moved by surface carriers, its potential could be realized only if new techniques were developed for handling such traffic with greater efficiency and lower costs, and this was likely only if the number of carriers taking part in blocked-space service was limited in its experimental stage. For this reason, the Board found it should be restricted to all-cargo carriers "at this time." This would not injure the combination carriers, for the diversion of existing traffic from those carriers would probably not be significant and they might be expected to acquire an increasing share of small-package shipments.

The Board had previously suspended, and ordered an investigation of, the blocked-space tariffs filed by Slick and petitioners. Following the issuance of its blocked-space regulation, it lifted its suspension of Slick's tariff, although continuing the investigation.[4] Shortly afterwards, the Board issued the order under review rejecting the blocked-space tariffs of petitioners on the ground that under the new regulation they were not authorized to provide this service (J.A. 94-7).

[4] The Flying Tiger Line subsequently filed a blocked-space tariff, and the Board similarly ordered an investigation (which is still pending) while allowing it to be put into effect.

The Board denied petitions for reconsideration by petitioners and others (Order E–21447, October 26, 1964, p. 4), stating that, on balance, the air transportation system as a whole would be benefited by giving all-cargo carriers the exclusive right to provide blocked space service at the present time. However, it stated, "we must stress * * * that our policy on blocked-space service is not an immutable one. We have acted in the light of the present and reasonably foreseeable circumstances. The policy is thus subject to amendment as the blocked-space experiment develops, and we, of course, retain our power to issue waivers under appropriate circumstances."[5]

On petitioners' suit for review, a panel of the court of appeals reversed the Board's order rejecting petitioners' tariffs, holding, with one judge dissenting, that it amounted to a modification of their certificates without compliance with the hearing requirements of Section 401(g) of the Act, 49 U.S.C. 1371 (Pet. App. D, 50a, Pet. App. A, 1a–12a). On rehearing *en banc*, the court, divided 5–3, sustained the Board. It held that the Board's action did not amount to a modification of the combination carriers' certificates; that the Board's distinction between combination and all-cargo carriers had a rational basis; and that the Board's action was a valid exercise of its power to make reasonable classifications of carriers and rules regulating them under Sections 204 and 416 of the Act, 49 U.S.C. 1324, 1386 (Pet. App. D, 55a, Pet. App. A, 13a–31a).

[5] Two members of the Board dissented, as they had from each of the prior orders in the case, questioning both the legality and the wisdom of the Board's policy.

Pointing out that the considerations that had moved the Board to adopt its policy were broadly legislative in nature, and did not rest on any evaluation of the merits or demerits of individual carriers, it ruled that use of rule-making procedures was entirely appropriate. Finally, it noted that the petitioners would have an adequate remedy in the courts if the assumptions on which the Board's policy was based changed and the Board refused to take appropriate action to modify it (Pet. App. A, 30a–31a).

ARGUMENT

The action of the Board in promulgating a rule that permits only all-cargo carriers to offer blocked-space service was reasonably found by the court below to be within the Board's broad rule-making power. Further review, we submit, is not warranted.

1. The Board has statutory responsibility for the promotion, development and regulation of civil aviation (49 U.S.C. 1302), and, to this end, it may exercise broad rule-making powers (49 U.S.C. 1373) and, specifically, it may classify air carriers according to the service they perform and define distinctions among classes (49 U.S.C. 1386(a)). This is what the Board did here. To encourage adoption of efficient methods of freight transportation, and thereby increase competition in this field by air carriers, the Commission has authorized the blocked-space experiment, initially limiting it to the all-cargo carriers so that they will have an inducement to exploit the service to the maximum. This kind of regulation is, we submit, within the normal scope of agency rule-making.

It is uniform and general in its application, legislative and prescriptive rather than judicial in its character. It is similar to many rules that have been upheld by the courts.[6]

Petitioners argue that the blocked-space rule effects a modification of the rights granted in the certificates under which they operate, and that therefore adjudicatory procedures—prescribed in the Act for modification proceedings—were necessary. The argument is without merit. Their certificates do not authorize—or even mention—blocked-space service, nor did combination carriers attempt to provide it until a blocked-space tariff was proposed by an all-cargo carrier.

To be sure, combination carriers are authorized to carry freight between the points specified in their certificates; but they retain this authority under the rule. Nor is there the slightest indication that any of their freight operations will be impaired because

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[6] See, *e.g.*, *Federal Power Commission* v. *Texaco*, 377 U.S. 33, 39–44 (regulations prohibiting specified types of pricing clauses widely used in natural gas contracts); *American Trucking Associations* v. *United States*, 344 U.S. 298 ("trip-leasing" regulations applied to some classes of carriers but not others); *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (regulations requiring extensive modification in existing radio networks' contracts); *United States* v. *Storer Broadcasting*, 351 U.S. 192 (multiple ownership of radio stations restricted by regulation); *Air Line Pilots Association* v. *Quesada*, 276 F. 2d 892 (C.A. 2), affirmed, 286 F. 2d 319 (C.A. 2), certiorari denied, 366 U.S. 962 (licensed pilots over 60 barred by regulation from piloting transport aircraft); *Capitol Airways* v. *Civil Aeronautics Board*, 292 F. 2d 755 (C.A.D.C.) (supplemental carriers handling military charters required to obtain individual exemptions from restriction on operating authority in lieu of prior blanket exemption).

competing air carriers will be offering blocked-space service. Since October 20, 1964, when blocked-space regulation became effective (Pet. App. A, 14a, n. 3), there has been little blocked-space traffic and no significant diversion of cargo business from petitioners (Pet. App. A, 31a), whose ability to compete for air-freight traffic has not been discernibly affected.[1] The court below has expressly preserved petitioners' right to reopen the issue of their exclusion from blocked-space service if petitioners' cargo service is impaired (Pet. App. A, 30–31a). In addition, petitioners have intervened in the still-pending investigation of the Flying Tiger and Slick blocked-space tariffs. There they will have full opportunity to object that the rate levels of those tariffs prevent them from providing their certificated service.

2. Petitioners also contend that the Board committed procedural errors in promulgating its rule. The court below, however, observed that "the procedure followed by the Board *admittedly* complies fully with the requirements for rule making established in Section 4 of the Administrative Procedure Act" (Pet. App. A, 15a; emphasis added). Petitioners' brief below made no argument that the Board's procedure was deficient. Their attempt to raise this issue now

[1] On the basis of official reports filed with the Civil Aeronautics Board by the carriers, it appears that in the year ending in May 1964 petitioners carried 57.9 percent of the nation's air freight, while the principal all-cargo operators (Slick and Flying Tiger) carried 16.8 percent. In the year ending in May 1966, nineteen months after implementation of the blocked-space regulation, petitioners' share of the air-freight market had *increased* to 62.9 percent, while the all-cargo carriers' share had *declined* to 13.3 percent.

is, we believe, belated. In any event, the record shows clearly that petitioners in fact had adequate notice—and actual knowledge—that one of the issues before the Board in the rule-making proceeding was whether the all-cargo carriers should be given exclusive blocked-space rights,[8] and petitioners had a reasonable opportunity to comment on this issue No more was required.

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[8] By supplemental notices of January 23, 1964, and June 22, 1964, the Board clearly made an issue of blocked-space agreements (J.A. 115, 137). Petitioners' written and oral comments to the Board demonstrated their awareness that the all-cargo carriers were proposing, and the Board considering, exclusive blocked space rights for the all-cargo carriers (J.A. 130–140, 167, 169, 171). They also had ample oppottunity to comment on the final regulation and its policy justification in their petitions for reconsideration which, with petitions by other interested persons, were carefully considered by the Board in determining whether to set the regulation aside.

CONCLUSION

For the reasons stated, the petition for certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.
DONALD F. TURNER,
Assistant Attorney General.
HOWARD E. SHAPIRO,
LAWRENCE G. MEYER,
Attorneys.

JOSEPH B. GOLDMAN,
General Counsel,
O. D. OZMENT,
Deputy General Counsel,
WARREN L. SHARFMAN,
Associate General Counsel,
FREDERIC D. HOUGHTELING,
Attorney,
Civil Aeronautics Board.

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v.

CIVIL AERONAUTICS BOARD, ET AL., *Respondents*.

BRIEF OF RESPONDENT SLICK CORPORATION IN OPPOSITION TO CERTIORARI

FREDERICK A. BALLARD
CECIL A. BEASLEY, JR.
American Security Building
Washington, D. C. 20005
Attorneys for Respondent
The Slick Corporation

Of Counsel:

LIPMAN REDMAN, ESQ.
815 Connecticut Avenue, N. W.
Washington, D. C. 20006

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BRIEF OF RESPONDENT SLICK CORPORATION IN OPPOSITION TO CERTIORARI

QUESTION PRESENTED

Whether rulemaking by a regulatory agency becomes invalid when it limits existing authority of a class of those regulated.

STATEMENT

This respondent (an intervenor in the court below) adopts the statement of the case contained in the brief on behalf of the Civil Aeronautics Board in opposition to certiorari.

ARGUMENT

I.

THE DECISION BELOW IS IN ACCORD WITH THE APPLICABLE DECISIONS OF THIS COURT

Petitioners contend, initially, that certiorari should be granted because the Civil Aeronautics Board itself represented to the court below, in seeking rehearing *en banc*, that

> "the question of administrative law presented is of major importance to the administration of the Federal Aviation Act and other similar regulatory statutes . . ." (R. 253)*

The present contention by petitioners is a non-sequitur in view of the ultimate decision below, which supports the rulemaking determination by the Board. A contrary decision *would* have created a problem of "major importance" to the administrative agencies; but the problem did not eventuate by reason of the reversal *en banc*. There is now no problem which would justify the intervention of this court.

A. The Civil Aeronautics Board Was Engaged in Routine Rulemaking

Petitioners' statement of the case (Petition 3-14) contains an excellent analysis of the Federal Aviation Act insofar as herein material—and in some respects immaterial.[1] But petitioners eschew much discussion

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* Record references follow those used by petitioners, see petition page 5, note 3.

[1] We consider the discussion of the tariff provisions to be essentially irrelevant, since if the Board's rulemaking was valid then the tariff consequences thereof are valid as following automatically in the train of the rule; compare *Superior Oil Company* v. *Federal Power Commission*, 322 F. 2d 601, 610 (C.A. 9, 1963), cert. den. 377 U.S. 922 (1964).

of the section which is, we submit, plainly dispositive, namely section 416(a) of the Federal Aviation Act (49 U.S.C. 1386):

> "(a) The Board may from time to time establish such just and reasonable classifications or groups of air carriers for the purposes of this subchapter as the nature of the services performed by such air carriers shall require; and such just and reasonable rules and regulations, pursuant to and consistent with the provisions of this subchapter, to be observed by each such class or group, as the Board finds necessary in the public interest."

Here the Board was acting with reference to its existing differentiation between passenger ("combination") and freight ("all-cargo") carriers.[2] With respect to this classification the Board was prescribing "just and reasonable rules and regulations" of a particular sort. Such prescriptions are necessary from time to time in any area of administrative regulation; and any such action in reference to an already existing classification necessarily may result in some limitation or change in pre-existing authority if it is to be meaningful. This does not make it invalid. *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956); *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943); *F.P.C.* v. *Texaco, Inc.*, 377 U.S. 33 (1964). This is, we submit, particularly clear where, as here, the pre-existing authority, i.e., blocked space, has not previously been actually used by the class which claims injury.

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[2] Compare the exercise by the Federal Power Commission of its similar statutory power of classification, in *Superior Oil Company* v. *Federal Power Commission*, *supra*, page 2, n. 1 (322 F. 2d 601, C.A. 9, 1963, cert. den. 377 U.S. 922, 1964).

Petitioners endeavor to distinguish the decisions of the Court just cited by contending that they apply only to "a *threshold* refusal to entertain a license application" (emphasis supplied), petition 21; but even if this were a valid interpretation of this court's decisions—which we think it is not—we submit that a limitation on hitherto unused authority is not significantly different from a limitation on previously unheld authority, in the context of rulemaking.

1. The Nature of Rulemaking

We do not undertake here any extended analysis of the legislative or "rulemaking" function of administrative agencies, as distinguished from their adjudicative function. The majority opinion *en banc,* below, reviews the legal characteristics of this dichotomy (petition 21a-25a). The classic statement in this court is that of Mr. Justice Holmes. In *Prentis* v. *Atlantic Coast Line,* 211 U.S. 210 (1908) he said:

> "* * * A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power * * *." 211 U.S. 226.

In a legislative type of hearing, such as confronted it here, the Civil Aeronautics Board is not seeking to determine rights of a particular carrier vis-a-vis another carrier, but rather is dealing in terms of categories and classifications of carriers, looking toward the future. In such a proceeding "it is not necessary that the full panoply of judicial procedures be used."

Hannah v. *Larche,* 363 U.S. 420, 442 (1960). As has been stated by the court below in a legally somewhat analogous situation:

> "* * * While fact finding may to some extent be involved in the process, the due process requirements of confrontation and cross-examination, the hallmarks of the judicial inquiry, are not necessarily present. Rather the quasi-legislative inquiry tends to consult broad relevant data available from surveys, studies and published experience, free from the limitations of confrontation and cross-examination. Initially, the quasi-legislative inquiry depends on staff work. As here, the staff report often is presented to the interested public with the invitation to appear at a public hearing to oppose or praise. From a practical standpoint, with respect to some forms of quasi-legislative inquiries, * * * * this is the only feasible way to proceed." *Jones, et al.* v. *District of Columbia.* (116 U.S. App. D.C. 301, 304; 323 F. 2d 306, 309 (1963).)

The established distinction between the legislative and judicial types of function of the administrative agencies is grounded in practical as well as logical considerations. This is clearly demonstrated here. The record before the Civil Aeronautics Board indicates on its face the large number of parties involved and the complexity of issues and potential issues which were adumbrated. Whether or not such was the purpose of the demands for hearings of an adjudicative type, the inevitable result of such a proceeding would have been to postpone any effective delineation of carrier roles in this area for many years in the future; and as will appear from an examination of the history of air freight in the Civil Aeronautics Board, see II, below, the passenger ("combination") carriers may well have

expected that the struggling all-cargo carriers could not survive until the termination of a proceeding of such complexity and duration. Such a consideration involves, we submit, a typical exercise of the legislative function.

II.

THE DECISION BELOW IS RIGHT

The dissenting opinion below proceeds on the basic misconception that there has been no legally recognized classification of freight or "all-cargo" carriers, as distinguished from passenger, or "combination" carriers. But such a classification was established by the Board in 1947 and has existed since. In that year, the Board adopted a regulation[3] permitting qualifying carriers to engage in the carriage of property only. Letters of Registration were issued under this regulation to nine carriers, including this respondent. In the *Air Freight Case,* in 1949, the Board decided to regulate this class by way of certificate of public convenience and necessity, and granted such certificates to four carriers, including this respondent. The identity of this class has since been consistently recognized by the Board and by the aviation industry.[4] The dissent is in error in its assumption that "the Civil Aeronautics Board's result here is reached by a rule which has different impacts upon members of the same basic category." (Petition 37a). The all-cargo carriers are not "of the same basic category" as the combination carriers; they are of a different category and have been so since 1947. The fact that their certificates use the same word—

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[3] Section 292.5 of the Board's Economic Regulations, adopted May 5, 1947 (Serial No. 389).

[4] E.g. *Airfreight Certificate Renewal Case,* 23 C.A.B. 186 (1956); *Domestic Cargo Mail Service Case,* 36 C.A.B. 344 (1962).

"property"—in defining their authority, as do the certificates of the combination carriers, seems to have impressed the dissenters, e.g. petition 33a, but is of no significance.

CONCLUSION

Respondent Slick Corporation submits that certiorari should be denied inasmuch as the decision below is 1) in accord with the applicable decisions of this court, and 2) is plainly right.

Respectfully submitted,

FREDERICK A. BALLARD
CECIL A. BEASLEY, JR.
American Security Building
Washington, D. C. 20005
Attorneys for Respondent
The Slick Corporation

Of Counsel:

LIPMAN REDMAN, ESQ.
815 Connecticut Avenue, N. W.
Washington, D. C. 20006

August 29, 1966.

REPLY

BRIEF

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONERS

HOWARD C. WESTWOOD
WILLIAM H. ALLEN
EDWARD J. GRENIER, JR.
701 Union Trust Building
Washington, D. C. 20005

CARL S. ROWE
25 Broadway
New York, N. Y. 10004

WARREN E. BAKER
640 Shoreham Building
Washington, D. C. 20005

H. TEMPLETON BROWN
ROBERT L. STERN
FLOYD M. RETT
231 South LaSalle Street
Chicago, Illinois 60604

Attorneys for Petitioners

Of Counsel:
COVINGTON & BURLING
CHADBOURNE, PARKE, WHITESIDE & WOLFF
MAYER, FRIEDLICH, SPIESS, TIERNEY, BROWN & PLATT

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REPLY BRIEF FOR PETITIONERS

I. THE RESPONDENTS' APPEAL TO IRRELEVANT LABELS

The briefs in opposition attempt to defend the action of the Civil Aeronautics Board as sustained by the Court of Appeals by affixing labels like "legislative" and "prescriptive" to the Board's action. When action is "legislative" rather than "judicial," so the argument runs, an agency may proceed by rule-making rather than pursuant to more formal notice and hearing procedures.

This is empty argumentation. Where a statute requires notice and hearing before certain action can be taken it is quite immaterial whether the action is characterized as "legislative" or "judicial." Ratemaking, which was the subject of Mr. Justice Holmes' opinion in *Prentis* v. *Atlantic Coast Line Co.*, 211 U.S. 210 (1908), quoted in Slick's brief in opposition (p. 4), is a classic example of quasi-legislative action. A ratemaking order looks to the future in the prescription of a new rule for application to future events. Very often, moreover, it deals with classes of parties or even with the universe of those regulated; sweeping minimum or maximum rate orders are typical. See, *e.g.*, *Air Freight Rate Investigation*, 9 C.A.B. 340 (1948). Yet there is no doubt of the necessity, under the usual regulatory statute—including the Federal Aviation Act—that ratemaking be performed on a record developed after notice in an evidentiary hearing.[1]

Licensing, which is what is involved in this case, also looks solely to the future; therefore it also is "legislative" in the sense in which respondents use that

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[1] This has just been recognized unequivocally by the Board's General Counsel—one of the signatories to the Board's brief in opposition—in an important address made on September 8, 1966, to the annual convention of the Federal Bar Association in Washington. The Board has reproduced the address and made it generally available. It is printed as an appendix hereto. (Pp. 1a-7a, *infra*). Recognition of the absolute requirement of notice and evidentiary hearing for ratemaking (unless rates are to be fixed as a condition to the grant of an exemption from the requirements of the Federal Aviation Act) appears at pp. 1a-2a, *infra*.

We refer to this address in other connections in this reply brief. It is a thoughtful and candid discussion, forthrightly informative for the benefit of the year's most important gathering of the legal officers of the federal government agencies and interested members of their bars.

word. Again, however, there is no doubt that under the usual statute the grant or denial—and under the Federal Aviation Act the alteration, amendment, modification or suspension—of a license may be effected only after notice and evidentiary hearing. It has been so held, under another statute that required notice and hearing before a license could be changed, when it was sought to change the certificate authority of an entire class of carriers without following the notice and hearing procedure. *Movers Conf. of America* v. *United States,* 205 F. Supp. 82, 86 (S.D. Cal. 1962). (Three-judge court).

The Flying Tiger Line, sole present beneficiary of the Board's blocked space policy statement and resulting orders, has not filed a brief in opposition in this case. Rather, in another case pending here, it has stated its agreement with the petitioners in the present case that the rulemaking procedure pursuant to which the Board has acted is unlawful. Flying Tiger finds "compelling" the authorities cited by petitioners and accepts the substance of the reasoning set forth by petitioners at pages 14 to 29 of their petition.[2]

II. THE RESPONDENTS' INVOCATION OF AN IRRELEVANT STATUTORY PROVISION

The briefs in opposition scarcely advert to Section 401(g) of the Act, the basis of this Court's decision in *CAB* v. *Delta Air Lines,* 367 U.S. 316 (1961), that an airline certificate of public convenience and necessity cannot be modified without an evidentiary hearing. Instead, they cite the Board's directive from Congress

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[2] See Petition for Certiorari, Flying Tiger Line v. Murphy, No. 508, this Term, pp. 24-26.

to consider certain things as in the public interest, Section 102; its authority to make rules "pursuant to and consistent with the provisions" of the Act, Section 204(a);[3] and its power to establish such classifications of air carriers "as the nature of the services performed by such air carriers shall require," Section 416(a). Neither singly nor in combination do these provisions sanction what the Board has done in this case.

Section 416(a) is particularly emphasized by the respondents. The Board says that "the distinction between combination and all-cargo carriers has been recognized for regulatory purposes ever since the Board certified a group of all-cargo carriers to serve as specialists in this field some twenty years ago." (Br. in Opp. pp. 2-3). And Slick says that "the Board was acting with reference to its existing differentiation between passenger ('combination') and freight ('all-cargo') carriers." (Br. in Opp. p. 3). Common sense tells one that there is a difference between an airline that has a license to carry passengers, property and

[3] The Board cites "49 U.S.C. 1373" for the Board's "broad rule-making powers." (Br. in Opp. p. 7). This is § 403 of the Act, dealing with the filing, publication and observance of tariffs. It gives the Board some rulemaking powers but scarcely broad ones. This section provides for regulations only governing the form and manner of filing, posting and publishing tariffs and the information to be contained in them, § 403(a); it also permits the Board, by regulation or otherwise, to permit the filing of tariff changes on less than the statutory 30-days notice "or modify the requirements of this section with respect to filing and posting of tariffs, either in particular instances or by general order applicable to special or peculiar circumstances or conditions," § 403(c). Since § 403 was never invoked in the rulemaking proceeding that led to the blocked space policy statement and in any case could have no pertinence, we assume that the citation is an inadvertence and that the intended reference was to § 204(a), 49 U.S.C. § 1324(a).

mail and one that is licensed to carry property and mail or property only. But the fact is that this difference has not been regarded as especially significant in the Board's regulation of carriers. Under the Board's Economic Regulations, 14 C.F.R. Pts. 200-99, distinctions are not drawn between passenger and non-passenger carriers in the regulation of their transportation of property except in a minor respect having to do with the nature and quantity of charter and special service flights that a non-passenger carrier can operate, 14 C.F.R. Pt. 207. And the cargo "specialist," Flying Tiger, is so unimpressed by the Board's classification power that it lately has attacked the Board's passenger charter regulation as illegally discriminatory in limiting the cargo carriers' authority to operate passenger charters in a manner in which the combination carriers' authority is not limited.[4]

In any event, Section 416(a) empowers the Board only to establish classifications of carriers based upon the nature of the services performed by them. This is a power to recognize, for regulatory purposes, differences in the kinds of service for which authority is held by various carriers. It is not in itself a substantive power to prescribe what services particular classes of carriers are authorized to perform, in disregard of the procedures set forth in other provisions of the Act that expressly deal with the way the power to authorize service is to be exercised. Nor is such substantive power supplied by the further authority of the Board conferred by Section 416(a) to prescribe

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[4] Flying Tiger Line v. Boyd, 244 F. Supp. 889, 892 (D.D.C. 1965), *aff'd without opinion sub nom.* Flying Tiger Line v. Murphy, D.C. Cir. No. 19,869, decided June 2, 1966, *petition for cert. filed* August 31, 1966 (No. 508).

"such just and reasonable rules and regulations, pursuant to and consistent with [the economic regulatory provisions of the Act], to be observed by each such class . . ., as the Board finds necessary in the public interest." Regulations under Section 416(a) can only be promulgated "pursuant to" substantive provisions of the Act such as Section 401 and must be "consistent" therewith. The Board, then, is wrong in implying that its action here is sustained by a statutory power to "define distinctions among classes" (Br. in Opp. p. 7), and Slick is wrong in asserting that regulations addressed to classes may validly "result in some limitations or change in preexisting authority" (Br. in Opp. p. 3)—if the procedure prescribed for limiting or changing pre-existing authority has not been followed.

An agency's power to recognize or establish classes of the entities subject to its regulation is relevant when the agency, following the procedure prescribed for it, takes action that affects one group differently from another. That is all that was held concerning the Federal Power Commission's power to classify the persons subject to its jurisdiction in *Superior Oil Co.* v. *FPC*, 322 F.2d 601, 621 (9th Cir. 1963), *cert. denied*, 377 U.S. 922 (1964), cited by Slick (Br. in Opp. p. 3 n.2).

This was apparently the role assigned to Section 416(a) by the court below. It referred to the sections of the Act now cited by the Board, including Section 416(a), and said that "this combination of powers . . . suffices to sustain the regulation on the merits, *assuming no procedural bar.*" (Pet. App. p. 18a) (Emphasis added). Its decision that there was no procedural bar derived from the novel rule it expounded that action that might have to be preceded by adjudicatory process

if directed against a single carrier can be taken by rulemaking if directed to all or an ascertainable class of carriers, a rule for which it claimed no statutory basis in the Federal Aviation Act.

On either rationale, that of the court below or that of the respondents, the question whether decisions of this Court as to the integrity of the licenses of regulated firms [5] may be evaded as the Board has sought to evade them warrants consideration by this Court.

III. THE NATURE OF BLOCKED SPACE SERVICE

The Board says in its brief in opposition that petitioners' "certificates do not authorize—or even mention—blocked-space service, nor did combination carriers attempt to provide it until a blocked-space tariff was proposed by an all-cargo carrier." [6] (Br. in Opp. p. 8). The Board proceeds to say that "combination carriers are authorized to carry freight between the points specified in their certificates" and that "they retain this authority under the [blocked space] rule." (*Ibid.*) The apparent conclusion is that certificate modification procedures were not necessary because the petitioners are still authorized to file such property tariffs as in fact they had filed in the past.

Of course, the certificates of the petitioners do not mention "blocked-space service" any more than do those of the all-cargo carriers. The certificates of both groups of carriers authorize the holders to engage in the air transportation of "property"—without quali-

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[5] CAB v. Delta Air Lines, 367 U.S. 316 (1961); United States v. Seatrain Lines, 329 U.S. 424 (1947); FCC v. National Broadcasting Co. (KOA), 319 U.S. 239 (1943).

[6] Slick makes something of the same point when it refers to "hitherto unused authority." (Br. in Opp. p. 4).

fication. The Board treated this authorization as encompassing blocked space service for both groups of carriers until four days after its policy statement was issued, and for the all-cargo carriers thereafter. (See Pet. pp. 8-11).

Whatever may be said in the Board's brief in opposition, the Board's General Counsel, a signatory to that brief, has forthrightly acknowledged more recently (note 1, *supra*) that "the blocked-space type of rule making . . . permits a diminution in the existing rights of a given class of licenses, without a hearing." (P. 7a, *infra*). And so, indeed, it does. Blocked space is nothing but a low rate for a particular kind of contractual arrangement with a shipper of property. An undiminished "property" certificate authorizes it. It takes a "diminution in the existing rights" of a carrier holding a "property" certificate to withdraw from that carrier the right to file a blocked space tariff. If "diminution in the existing rights" under a carrier's certificate is not "modification" of that certificate, surely merest semantics have triumphed over logic.

In any case, the statements in the Board's brief in opposition portend sweeping significance for the decision below—which the Board's General Counsel's more recent statement does not attempt to disguise. Any combination of reduced passenger fares and some other element—no reservations, closely-spaced seating, etc.—can be decked out as a new kind of "service" just as easily as can blocked space. If the words of the brief in opposition are taken at face value, the Board may now regard itself as empowered, merely by adoption of a policy statement, to authorize carriers *A, B* and *C,* but not carriers *X, Y* and *Z,* to provide

"no-reservation service" or "economy-class service," for example, if only the combination of elements in the tariff terms for the "service" is something different from what has been done theretofore. Such examples are no more extreme than, and no different in principle from, what the Board has done with respect to blocked space. In short, the Board now proclaims that managements' tariff innovations can be controlled by rule-making without evidentiary hearings. This is novel, even revolutionary, in the relationship between government and private management with respect to private initiative in rate competition. *Cf. Georgia* v. *Pennsylvania R.R.*, 324 U.S. 439, 458-59 (1945); *Arizona Grocery Co.* v. *Atchison T. & S.F. Ry.*, 284 U.S. 370 (1932).

IV. THE ILLUSORY ASSURANCES THAT PETITIONERS WILL NOT BE HURT BY THEIR COMPETITOR'S LOW BLOCKED SPACE RATES

Certainly there would be the same emphasis by the Board in the kind of passenger fare situation we have suggested as there is in this case on the allegedly "experimental" nature of its action, with verbal assurances that the Board would not permit the disfavored carriers to be seriously hurt. The Board plays on this theme in various ways in its brief in opposition.

1. The Board says that petitioners have not yet suffered significant diversion of their freight business. (Br. in Opp. p. 9). If that is so it is because of Slick's demise and Flying Tiger's choice not to engage in all-out promotion of blocked space until this litigation is terminated. The year ending in May 1966 in which the Board says that Flying Tiger's and Slick's share of the air-freight market declined slightly from a previous twelve-month period (Br. in Opp. p. 9 n.7)

included nine months in which Slick's service was suspended. Flying Tiger, which did very well in the most recent twelve-month period for which the Board gives figures, with its traffic growing at a rate quite commensurate with the growth rate of petitioners' freight traffic, has made no secret of the fact that it has been waiting for this litigation to end before it seeks seriously to capitalize on its blocked space monopoly. In its annual report to stockholders for 1965 Flying Tiger noted that its " 'blocked space, program . . . for a long time was under court consideration," during which time "the Company did not stress the development of this program." With the decision of the court below on March 2, 1966, the report went on, "the Company plans to actively pursue this method of shipment." (P. 4).

2. The Board points out that, in denying petitions for reconsideration of its promulgation of the blocked space policy, it stated the obvious—that the policy was subject to change and might someday be changed. (Br. in Opp. p. 6). If this is taken to mean that the certificates of petitioners and the other combination carriers have been temporarily suspended in part rather than altered, modified or amended, the Board's action is still illegal. Suspension as well as alteration, modification or amendment is subject to Section 401(g).

3. If its own assurances are not enough, says the Board, then surely it is sufficient that the court below "noted that the petitioners would have an adequate remedy if the assumptions on which the Board's policy was based changed and the Board refused to take appropriate action to modify it . . . ." (Br. in Opp. p. 7). Despite the invitation extended in our petition to elucidate this point (pp. 28-29), the Board's brief in

opposition leaves as shrouded in mystery as it was when the court made the paraphrased statement the question of how review of a refusal by an agency to amend a rule is obtained—let alone how the dubious availability of such review validates agency action otherwise unlawful.

4. Finally, the Board says that in the investigation of the Flying Tiger and Slick tariffs that is pending before the Board petitioners "will have full opportunity to object that the rate levels of those tariffs prevent them from providing their certificated service." (Br. in Opp. p. 9). This is cold comfort for the petitioners. The Board's view is that only if their ability to transport property between the points named in their certificates is altogether destroyed, their investment of hundreds of millions of dollars in cargo service rendered completely valueless, will they be entitled to relief from their competitor's low rates. That is not the kind of protection of license authority that this Court has had in view in its controlling decisions. (See note 5, *supra*).

V. THE INADEQUACY OF THE BOARD'S RULEMAKING PROCEEDING

The Board suggests, none too forcefully, that the third question raised by petitioners was waived below. (Br. in Opp. pp. 9-10). That is the question whether the Board, in promulgating its policy statement and then in transmuting it into a binding rule of conduct, adhered even to the rudimentary legal requirements as to notice and opportunity to comment in rulemaking. The Board's diffidence is understandable. The issue was before the court below. The point had been argued to the Board. The facts showing lack of notice

and opportunity to comment were stated by the petitioners forcefully and clearly in the court below. The Board devoted upwards of three pages of its brief below to attempting to demonstrate that a contention of "lack of notice and opportunity for comment under the rulemaking requirements of the Administrative Procedure Act . . . lacks merit." (Br. for Respondent, D.C. Cir. Nos. 18,833 et al., pp. 16-20). In their answer to the Board's petition for rehearing en banc petitioners said that "even if the Board had the power it asserts to reduce the Petitioners' certificated authority by rulemaking rather than adjudication, its decision here would have to be reversed because it did not even provide a fair rulemaking proceeding." (Pp. 11-12). The contention was renewed explicitly at the en banc oral argument.

It is clear, moreover, that the question of the fairness of the procedure the Board followed, the adequacy of that procedure in light of the nature and importance of the issues and interests at stake, was inherent in the case from the beginning. The court below engaged in an extended discussion of the adequacy of the Board's procedure in that light. (Pet. App. pp. 26a-30a). Because, we submit, of a faulty appraisal of the Board's rulemaking proceeding, the court concluded that the procedure was adequate. Certainly that conclusion below does not remove the issue from the case here.

What is said in the Board's argument on the merits of this question was anticipated in our petition, except for one thing. The Board states that petitioners filed and the Board entertained petitions for reconsideration after it had promulgated its policy statement and given it effect as a substantive regulation, and after this litigation had begun. It implies that this somehow cured or mitigated the original lack of notice and opportunity to

comment. (Br. in Opp. p. 10 n.8). When the Board published its policy statement and then made it a rule of substantive law, there was of course notice of what was afoot. That, indeed, precipitated this litigation. But Section 4 of the Administrative Procedure Act is designed to assure interested persons the right, through making written comments, to participate in the formulation of rules. It is not enough under Section 4 to afford them the privilege of objecting to rules already made. In *Chicago, B. & Q.R.R.* v. *United States,* 242 F. Supp. 414 (N.D. Ill. 1965), *aff'd per curiam,* 382 U.S. 422 (1966) (Pet. pp. 35-36), where the ICC's repeal of a rule was set aside for lack of notice, those complaining of the lack of notice had filed petitions for reconsideration with the agency; the ICC, whose whole contention was that the complainants had been dealt with fairly, did not even attempt to make this a part of its argument in this Court (or, so far as appears, in the District Court). Rulings on petitions for reconsideration, especially after litigation has begun, are too likely to be briefs in support of the original action to satisfy the Administrative Procedure Act.

One final point: While doubtless unintentionally, the Board's reference to "supplemental notices of January 23, 1964, and June 22, 1964" (Br. in Opp. p. 10 n.8) may be misleading. The "supplemental notice" of January 23 was the first notice in which blocked space was mentioned. It set forth only the Board's proposed policy of encouraging pooling agreements between combination and all-cargo carriers. The June 22 notice was the notice of oral argument, in which the additional question of whether the all-cargo carriers should be allowed to sell blocked space to forwarders and shippers was raised; even then it was not stated that the Board proposed to make this privilege exclusive to the all-cargo carriers. (See Pet. pp. 6-8). The

written comments of petitioners and the other combination carriers were addressed to the first notice. These comments "demonstrated their awareness," to use the Board's words, (1) of the nature of the Board's proposal respecting pooling agreements and (2) of the all-cargo carriers' ultimate goal of securing a monopoly of service in freighter aircraft. But for the latter awareness no thanks were due to the Board or its notice. The all-cargo carriers' White Paper, presented to the Board *ex parte* (Pet. p. 6), had leaked. Moreover, it was not an awareness that the Board itself had under consideration a regulation not even hinted in its notice, whereby it would go all or part of the way toward giving the all-cargo carriers the monopoly they were hoping eventually to achieve. The combination carriers merely said that it would be illegal for the Board to attempt to do what the all-cargo carriers were hoping might someday be done. We invite the Court's reading of the relevant record pages. (R. 193-201, J.A. 129-37).

Much more was required in the way of notice and the opportunity to participate meaningfully in the formulation of its blocked space policy statement than the Board afforded.

CONCLUSION

In its brief in opposition Slick attempts to discount the Board's statement in asking for rehearing en banc below that "the question of administrative law presented [by this case] is of major importance to the administration of the Federal Aviation Act and other similar regulatory statutes . . . ." (P. 2). It says that a contrary decision below would have caused a "problem" of major importance for the administrative agencies but that since the decision was in favor of the Board's power to proceed by rulemaking "the problem did not eventuate . . . ." It is an odd kind of

question that is important or not depending on how it is answered; Slick manages this difficulty only by its switch from "question," which is what the Board said, to "problem," which is Slick's paraphrase.

Regardless of that, however, the General Counsel of the Board, a signatory to the Board's brief in opposition, regards the decision below as "of considerable significance in the light which it throws on the scope of rule-making authority" and as holding "great promise for expanded use of rule making." (Pp. 2a, 3a, *infra*). He made these statements in his address to the Federal Bar Association at its annual convention on September 8, to which we have referred. (Note 1, *supra*). His entire address, as published by the Board, is printed as an appendix to this reply brief at pages 1a-7a, *infra*.

He said that the court below "sustained the Board's action even though the rule had diminished the licenses of the combination carriers without hearing," and he said that one of the "ground rules" that the opinion suggests the court below "will follow in its sympathetic approach to rule making" is that "rule making can be used even where the effect is to take action which would benefit one class of persons at the expense, so to speak, of another." (P. 3a, *infra*). And, although the Board in its brief in opposition here by citation analogizes this case to those cases, notably *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956), in which threshold limitations on license applications have been sustained by this Court (Br. in Opp. p. 8 n. 6), the Board's General Counsel in his remarks carefully distinguished between "rule making as a means of carving out categories of license applications that could be denied without an adjudicatory hearing" (*i.e.*, the *Storer* type case) and "the blocked-space type of rule making that permits a diminution in the existing

rights of a given class of licenses, without a hearing." (Pp. 6a-7a, *infra*).

Is the "blocked-space type of rule making," diminishing license rights without a hearing, permissible within the terms of the governing statute and this Court's decisions? That question is novel and of the utmost importance. The petition should be granted.

Respectfully submitted,

HOWARD C. WESTWOOD
WILLIAM H. ALLEN
EDWARD J. GRENIER, JR.
701 Union Trust Building
Washington, D. C. 20005

CARL S. ROWE
25 Broadway
New York, N. Y. 10004

WARREN E. BAKER
640 Shoreham Building
Washington, D. C. 20005

H. TEMPLETON BROWN
ROBERT L. STERN
FLOYD M. RETT
231 South LaSalle Street
Chicago, Illinois 60604

Attorneys for Petitioners

Of Counsel:

COVINGTON & BURLING

CHADBOURNE, PARKE,
WHITESIDE & WOLFF

MAYER, FRIEDLICH, SPIESS,
TIERNEY, BROWN & PLATT

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APPENDIX

REMARKS BEFORE THE FEDERAL BAR ASSOCIATION, SEPTEMBER 8, 1966

JOSEPH B. GOLDMAN
General Counsel
Civil Aeronautics Board

In deciding what to talk about tonight, I had to make a choice between substance and procedure. Like most regulatory lawyers, I am interested in the substance of what our agency does—but my primary task is procedural—at least that is what our policy staff wants me to believe. In any event, for the purposes of this evening, I will avoid the substance of aviation regulatory policy. I will try to abstract some developments in the Board's legal work which may have general significance for administrative law.

Perhaps the most significant development at the Board has been the increased accent on rule making. Like all regulatory agencies, the CAB faces the dilemma of doing things expeditiously, but doing them with sufficient safeguards to protect individual rights. When we follow adjudicatory procedures, with a full evidentiary hearing, the price we pay in terms of delay is high. Consequently, we try to use rule making whenever possible, to speed things up.

One of the most successful examples of this practice relates to fixing minimum rates for services to the military establishment. Fortunately we were able to fix these rates without an adjudicatory hearing, because we did so as a condition to the exemptions we granted for engaging in the business. In contrast, ordinary commercial rates for passengers or cargo can only be prescribed after full hearing.

In the past year, the Board fixed minimum rates for military business totaling some 400 millions of dollars—to the satisfaction of the air carriers and the military services—and with nothing more than conventional rule-making procedures. By rule making, the Board was able to establish a whole new rate level and structure on July 1, 1965. Later, by rule making in February 1966, the Board was able to make major adjustments in these rates to reflect new economic conditions. I think this experience in rate making is very illuminating when we compare it with the strictures imposed by statute on regulation of commercial rates. Only once has the Board attempted to prescribe the general level of passenger fares after full evidentiary hearing—it took years to go through the procedures; and at the end of the case, the conditions in the industry had so radically changed that the Board did not attempt to prescribe the permissible level of rates.

A recent decision of the Court of Appeals for the D. C. Circuit, sitting *en banc,* holds great promise for expanded use of rule making. I refer to *American Airlines* v. *Civil Aeronautics Board* decided in March of this year. The case arose in connection with a regulation dealing with blocked-space service—the carriage of cargo at reduced rates where the shipper agrees to pay for a specified amount of space on a regularly recurring basis, whether he uses it or not. The regulation stated that it was the policy of the Board to permit only the all-cargo carriers to provide such service. Under the regulation, the combination carriers—carriers authorized to carry passengers, cargo, and mail—would not be permitted to provide blocked-space service. Acting under this regulation, the Board accepted blocked-space tariffs from the all-cargo carriers, but rejected similar tariffs of the combination carriers. On appeal, the combination carriers contended that the Board's action amounted to a modification of their existing licenses to carry freight. Modifications of certificates of public convenience and necessity may be made only after an ad-

judicatory hearing. The court sustained the Board's action even though the rule had diminished the licenses of the combination carriers without hearing.

Although the court's action was by no means without precedent, the blocked-space decision is of considerable significance in the light which it throws on the scope of rule-making authority. The opinion of Judge Leventhal goes to some length to suggest the ground rules that the court will follow in its sympathetic approach to rule making:

First, where the agency acts to lay down general standards, prospective in operation, and applicable to a broad class of persons, there will be a presumption in favor of the use of rule making, in the absence of some clear indication that Congress intended otherwise.

Secondly, rule making can be used even where the effect is to take action which would benefit one class of persons at the expense, so to speak, of another.

Thirdly, even where there are significant disputes of fact, a hearing prior to promulgation of a rule may not be required if the disputed facts turn on economic forecasts involving expert opinions. In the blocked-space case, the court found that no oral hearing was required. The combination carriers had urged a hearing to determine the impact of the blocked-space service on their business, but the court considered that that issue involved "legislative" rather than "adjudicative" facts. In the court's words, it was the kind of an issue "involving expert opinions and forecasts which cannot be decisively resolved by testimony. It is the kind of issue where a month of experience will be worth a year of hearings."

In this connection, the opinion points out that the fair functioning of the rule-making process requires that rules be subjected to re-examination on the basis of experience. The court emphasized that it is the obligation of the agencies to make appropriate re-examinations and adjustments.

Since this case is before the Supreme Court on petition for writ of certiorari, we cannot be certain that the *en banc* decision of the Court of Appeals is final. However, I believe the text of the opinion is very illuminating in terms of the court's general attitude toward rule making.

I would now like to turn to the Board's problems in the field of adjudication. Many of you are aware of Judge Friendly's criticism of the administrative agencies and his call for a Better Definition of Standards.

The ideal, of course, is that the agency should decide cases on the basis of principles and policies having continuing validity from one case to the next. The demand is that the agency articulate the principles and policies by which it is guided, so that an impartial onlooker, knowing the facts of a particular case, will be able to predict with a fair degree of accuracy how the case will be decided.

I am sure there is no one at the Board who does not share this ideal. But there is no area in which there is a greater gap between what would be ideally desirable and what is possible. The standards which Congress has given the Board are the "public interest" and the "public convenience and necessity." These have been coupled with a set of more specific goals such as the preservation of "the inherent advantages of" air transportation; "fostering sound economic conditions in" air transportation; "competition to the extent necessary" to achieve these goals, and the like.

In specific cases that come before the Board, these general considerations more often compete than coincide, and the problem is to work out the best possible accommodation among them. That can hardly be done by exalting one factor above all the others, or declaring in advance that one factor will be assigned a given weight in every case, regardless of what else the evidence shows. Nor can the Board simply rely on its past decisions for precedents

which will automatically fit new cases, especially where the agency has to regulate an industry which is in so rapid a state of flux.

Two recent cases which illustrate this problem are *City of Lawrence* v. *Civil Aeronautics Board* and *Outagamie County* v. *Civil Aeronautics Board.* Both involve Board decisions requiring nearby cities with their own airports to be served through a single airport.

In the *Lawrence* case, the Board had consolidated or eliminated poorly patronized air service at a number of New England communities. Two of those communities appealed, and one of them, New Haven, succeeded in convincing the Court of Appeals for the First Circuit that an injustice had been done.

To us at the Board, the majority opinion of the court in the *Lawrence* case was disturbing not so much because the Board was reversed—we don't claim to be infallible—but because of what the opinion suggested for the future. For instance, the court held, after citing Judge Friendly's thesis, that failure to articulate specific decisional standards leads straight to arbitrary action. Did that mean that the Board could no longer follow its traditional method of weighing the favorable factors against the unfavorable in each case? Did it mean that *no* valid decision could be arrived at until the Board adopted and published a set of decisional rules for area airport cases? When the Board reopened the *New Haven* case, the New Haven petitioners contended just that.

Similarly, the court in the *Lawrence* case charged the Board with departing without explanation from its earlier cases. But the allegedly inconsistent prior cases were all quite different on their facts, and none of them purported to lay down any hard-and-fast rules by which all subsequent cases were to be decided. Did the opinion mean that, before the Board could render any further decisions in this field, it must stop and reconcile all of its prior cases?

In this setting, we approached the *Outagamie* case. There, as in *Lawrence*, the Board had consolidated air service to several pairs of Wisconsin communities at area airports, and three of the cities losing home-airport service appealed. The Board's order explained the Board's decision in much the same terms as had the order upset in *Lawrence*.

Yet the *Outagamie* decision upheld the Board on every point—and did so in broad language vindicating the Board's decisional process. The Seventh Circuit held it entirely proper for the Board to decide by the weighing and balancing of factors. It found the demand for standards to be adequately met by the Board's announcement in advance of the factors which would be considered. But it held that any one factor need not be given the same weight in all cases, and may indeed be given no weight at all where other factors are found decisive. Nor need the Board make findings as to each of the factors concerning which evidence has been adduced.

As for prior decisions, the court held that the Board need not undertake to distinguish them where they are not substantially identical on their facts with the present case. And it added an explicit recognition of the Board's need for flexibility of decision, to meet changing conditions in a fast-developing industry.

We at the Board think that *Outagamie* is a better decision than *Lawrence*, and we see some signs in more recent cases that the former is the view that will prevail. But we are under no illusion that we can relax our efforts to develop better decisional standards where the subject matter permits.

It may well be that the Board could make more use of rule making for this purpose. I have already talked about rule making as a means of carving out categories of license applications that could be denied without an adjudicatory

hearing. I have also discussed the blocked-space type of rule making that permits a diminution in the existing rights of a given class of licenses, without a hearing. A third type of rule making that could be helpful would be a rule making that does not dispense with the need for adjudicatory proceedings, but either disposes of particular issues that are common to a class of adjudicatory proceedings, or at least specifies the factors that will be weighed in deciding issues subject to adjudication.